Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

CARL E. BROWN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a state must expressly cede jurisdiction over state-owned property to the United States; or does a state lose jurisdiction over state-owned property by its active participation in the creation of a national park within its boundaries?

2. Whether the Property Clause gives Congress the power to regulate commercial activities on state-owned property located within the exterior boundaries of a national park?

3. Whether Congress delegated to the National Park Service its Property Clause authority to regulate commercial activities on state-owned property located within the exterior boundaries of a national park?

## LIST OF PARTIES

Carl E. Brown, in *United States of America v. Harold M. Armstrong and Carl E. Brown*, was a Defendant before the United States District Court for the District of Minnesota and an Appellant before the United States Court of Appeals for the Eighth Circuit.

The United States of America brought this action and was the Appellee before the United States Court of Appeals for the Eighth Circuit.

## STATEMENT OF RELATED CASES

The issues presented by this petition were the subject of an earlier decision by the United States Court of Appeals for the Eighth Circuit, *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) (*Brown I*), *cert. denied*, 431 U.S. 949 (1977), and involved one of the same parties, that is, Carl E. Brown.

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## OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Eighth Circuit, *United States of America v. Harold M. Armstrong and Carl E. Brown*, 186 F.3d 1055 (8th Cir. 1999), upholding the decision of the U.S. District Court for the District of Minnesota, which Eighth Circuit opinion appears at pages App. 1 to App. 20 of the Appendix. The opinion and order of the United States District Court for the District of Minnesota, *United States of America v. Harold M. Armstrong and Carl E. Brown*, Criminal No. 98-145 (D. Minn. filed Jan. 5, 1999), which upheld the underlying decision of the Magistrate Judge, appears at pages App. 21 to App. 26. The decision of the Magistrate Judge in *United States of America v. Harold M. Armstrong and Carl E. Brown*, Violation Notice P006608 and P006607 (D. Minn. filed Apr. 27, 1998), appears at pages App. 27 to App. 53.

## STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the United States Court of Appeals for the Eighth Circuit on July 28, 1999, App. 1 to App. 20, rehearing *en banc* denied, September 10, 1999. App. 54. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Footing Doctrine, the Property Clause, and the Tenth Amendment to the United States Constitution are involved in this Petition for *Writ* of *Certiorari*. App. 55.

## STATUTES INVOLVED

The Voyageurs National Park Act, 16 U.S.C. § 160, *et seq.*, and 40 U.S.C. § 255 are involved in this Petition for *Writ* of *Certiorari*. App. 56-58.

## STATEMENT OF THE CASE

On August 10, 1996, Mr. Carl E. Brown and Mr. Harold "Bo" Armstrong were charged with conducting commercial operations on Rainy Lake within Voyageurs National Park ("VNP") in violation of 36 C.F.R. § 5.3.

On December 10 and 11, 1997, a trial was held before the U.S. Magistrate for the U.S. District Court for the District of Minnesota.

On April 27, 1998, the U.S. Magistrate for the U.S. District Court for the District of Minnesota found Messrs. Brown and Armstrong guilty and imposed sentence, from which a timely appeal was filed on July 28, 1998.

On January 5, 1999, U.S. District Judge John R. Tunheim of the U.S. District Court for the District of Minnesota upheld the Magistrate's judgment, from which a timely appeal was filed on January 15, 1999.

On July 28, 1999, the U.S. Court of Appeals for the Eighth Circuit upheld the judgment of the District Court, but reversed a portion of the sentence and remanded the matter for that purpose. On December 1, 1999, the District Court entered an Order modifying the terms of Carl E. Brown's sentence consistent with the ruling of the U.S. Court of Appeals for the Eighth Circuit.

On August 24, 1999, Carl E. Brown filed a petition for rehearing *en banc*, which was denied by the U.S. Court of Appeals for the Eighth Circuit on September 10, 1999.

This Petition for *Writ* of *Certiorari* follows.

## STATEMENT OF FACTS

The State of Minnesota was admitted into the Union as a sovereign state on February 26, 1857, on an "equal footing" with the 13 original States, whereby it received ownership and jurisdiction over navigable waters within the State of Minnesota, including Rainy Lake.

In 1891, Minnesota sought the creation of a VNP. In 1971, after nearly eighty years, Congress passed VNP legislation and, in 1975, VNP was established.

To create VNP, Minnesota donated over 35,000 acres of state and other publicly owned land to the United States:

> [T]he governor . . . shall donate and convey to the United States of America the state's interest in all of the following *lands* lying within the boundaries of Voyageurs National Park . . . : (1) trust fund *lands;* (2) *lands* forfeited to the state

> for nonpayment of taxes and held in trust by the state for taxing districts; and (3) other *lands* acquired or otherwise owned by the state. Each conveyance of these *lands* shall contain the following: . . . (2) *a reservation to the state of all . . . water power rights.*
>
> . . .
>
> [T]he governor . . . shall donate and convey to the United States of America, for Voyageurs National Park, the state's interest in the following described *lands*:
>
> (1) Lot 7, Section 4, Township 68 North, Range 18 West;
>
> (2) the *area of land* commonly referred to as the Kabetogama Forestry Station . . . and located in Section 21, Township 69 North, Range 21 West; and
>
> (3) *land* not exceeding 120 acres consisting of a strip of land through that portion of Section 1, Township 68 North, Range 20 West, which is roughly parallel to and 400 feet on each side of the unimproved road . . . .

Minn. Stat. § 84B.03 (emphasis added) (same as Laws of Minnesota 1971, Chapter 852, Section 3). App. 59.

Furthermore, Minnesota provided:

> Consent of the state of Minnesota is given to the acquisition by the United States . . . of *lands* lying within the boundaries of Voyageurs National Park . . . .

Minn. Stat. § 84B.06 (emphasis added) (same as Laws of Minnesota 1971, Chapter 852, Section 6). App. 63.

The Deed by which Minnesota conveyed the lands to the United States for VNP provides:

> Whereas, the State of Minnesota has concurred with the stated purpose of Congress in authorizing the establishment of the park and has directed *the donation and conveyance of State lands* to the United States of America for Voyageurs National Park.
>
> . . .
>
> [Minnesota] does hereby donate and convey unto [the United States], for the purposes of Voyageurs National Park, *all of its interests except . . . water power rights, in lands* lying and being in the County of Koochiching, State of Minnesota, described as follows . . . .
>
> . . .
>
> *[A]ll water power rights are reserved to the State of Minnesota.*

*See* Deed at 1-3 (emphasis added). App. 67 to App. 69. The Deed also contains several references to "the *lands* so donated and conveyed" and "donation of all state-owned *lands*." *Id.* at 3 (emphasis added). App. at 70. The Deed contains no similar references to water.

In addition, Congress recognized that Minnesota had neither donated nor ceded its water or jurisdiction over its water to the United States and that the United States was receiving only land from the State of Minnesota:

> Provided, That the Secretary shall not establish the [Voyageurs National P]ark until the *lands* owned by the State of Minnesota and any of its political subdivisions within the boundaries shall have been donated to the Secretary for the

> purposes of the park: Provided further, That the Secretary shall not acquire other *lands* by purchase for the park prior to such donation. . . .

16 U.S.C. § 160a (emphasis added).[1] Furthermore, Congress did not authorize the United States to obtain water or water jurisdiction from Minnesota. *Id.*

In *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977) ("*Brown I*"), Carl Brown's conviction for violating national park regulations by hunting ducks on Rainy Lake was upheld. The Court held that "[a]lthough the state of Minnesota did not expressly cede jurisdiction over the waters in the park [that is, Rainy Lake] to the United States," the state's active participation in the creation of VNP was "tantamount to a cession of jurisdiction" over the waters within the park. *Id.* at 821. Alternatively, the Eighth Circuit held that even if the state did not cede jurisdiction over such waters, the Property Clause permitted the NPS to regulate hunting on waters owned by Minnesota. *Id.*

In response to the *Brown I* decision, Minnesota reaffirmed its intent, as expressed in the Deed and the 1971

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[1] At times, Congress has granted authority to an acquiring federal agency to obtain water and water rights, as well as land. For example, 16 U.S.C. § 410ii-3, which created the "Chaco Culture National Historic Park" in New Mexico, provides, "The Secretary is authorized to acquire lands, *waters, and interests therein* within the boundaries of the Chaco Culture National Historic Park . . . with donated or appropriated funds, or exchange." (Emphasis added.) The same language is set forth at 16 U.S.C. § 459d-3, creating the National Seashore Recreational Areas.

Minnesota Statutes, not to cede its water or jurisdiction over its water:

> In making these [land] donations, none of the navigable waters within the [Voyageurs National] Park and the lands under them have been donated to the United States. These navigable waters include the following: Rainy [Lake] . . . Pursuant to applicable federal and state law, navigable waters and their beds are owned by the state [of Minnesota]. *Ownership and jurisdiction* over these waters and their beds *ha[ve] not been ceded by the state [of Minnesota], either expressly or implicitly, to the United States.* Unlike section 1.044 relating to the Upper Mississippi Wildlife and Fish Refuge, where the state expressly granted its consent and jurisdiction to the United States to acquire interests in the water, as well as land, the consent granted by the state [of Minnesota] in section 84B.06 to acquisitions by the United States for Voyageurs National Park *is limited to land, only.*

Minnesota Statutes, § 84B.061 (emphasis added). App. 63.

Furthermore, "In the discharge of their official duties, the governor, attorney general, other constitutional officers, and other public officials . . . shall vigorously assert and defend, in all forums, the state's ownership of and jurisdiction over these waters and their beds." *Id.*

Rainy Lake, which adjoins VNP, is bisected by the international boundary between the United States and Canada. The portion of Rainy Lake within the United States, over which Minnesota claims ownership and jurisdiction, is within Minnesota's boundaries. The portion of Rainy Lake within VNP is completely within Minnesota's

boundaries. The site on Rainy Lake where Messrs. Brown and Armstrong were cited is upon waters over which Minnesota claims ownership and jurisdiction under the Equal Footing Doctrine.

On August 10, 1996, Messrs. Brown and Armstrong were carrying paying passengers on Rainy Lake from Thunderbird Lodge in the United States (Point A on map, App. 73) and Fort Frances, Ontario, Canada, to Hale Bay in Canada (Point C on map). They traveled on the United States side of Rainy Lake because it is infeasible to travel safely from their origins to destination without passing through the Brule Narrows, a portion of Rainy Lake over which the National Park Service ("NPS") claims jurisdiction. They had no intention to dock within VNP or to go ashore within VNP or to permit others to go ashore within VNP.

When Messrs. Brown and Armstrong were stopped and cited by the NPS (Point B on map), at no time had they gone ashore or docked or permitted others to go ashore on any land that is part of VNP. At all times Messrs. Brown and Armstrong remained on Canadian or Minnesota waters within the safe passage channel marked by the Coast Guard.[2] Nonetheless, the NPS cited them for conducting commercial enterprises within VNP in violation of 36 C.F.R. § 5.3.

After a trial conducted on December 10 and 11, 1997, Messrs. Brown and Armstrong were convicted on April

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[2] This safe passage channel is so designated on official maps of Rainy Lake and is marked and maintained by the Coast Guard. Buoys in the water mark the boundaries of the channel. It is the safest route across Rainy Lake.

27, 1998, notwithstanding their assertion that the State of Minnesota, not the NPS, owns and has jurisdiction over Rainy Lake, and notwithstanding a brief filed in support of that argument by the Attorney General of the State of Minnesota. In convicting Messrs. Brown and Armstrong, the Magistrate Judge relied on the holding of the U.S. Court of Appeals for the Eighth Circuit in *Brown I*, rejecting the arguments set forth by Messrs. Brown and Armstrong and the Minnesota Attorney General. The U.S. District Court upheld their conviction on the same basis, rejecting not only their arguments but also Minnesota's claims to sovereignty over Rainy Lake as made by the Minnesota Attorney General.

The U.S. Court of Appeals for the Eighth Circuit upheld the convictions of Messrs. Brown and Armstrong, ruling that its decision was mandated by its earlier holding in *Brown I*, which "correctly decided the cession issue," reasoning that Minnesota "had ceded jurisdiction." Op. at 7, 8. App. 8. In so ruling, the Eighth Circuit rejected not only arguments set forth by Messrs. Brown and Armstrong, but also Minnesota's claims to sovereignty as made by the Minnesota Attorney General.

In *Brown I*, the Eighth Circuit had held:

> In this case it is not abundantly clear that the state ceded jurisdiction over waters in the park to the United States. *See* Minn. Stat. Ann. §§ 84B.01 *et seq.* The state's enabling legislation in section 84B.06 ostensibly consents to federal acquisition and concurrent jurisdiction only over lands within the park. *Brown I* at 820.

* * *

> The waters in question are located within the park boundaries but are owned by the state of Minnesota. The deed by which the state conveyed the lands in the park to the United States expressly reserved "all water power rights" to the state. *Id.*, fn. 3.

Nonetheless, the Eighth Circuit in *Brown I* stated that Minnesota's support for creation of VNP was "*tantamount* to a cession of jurisdiction."[3] *Brown I* at 821 (emphasis added).

In the instant matter, the Eighth Circuit relied on its decision in *Brown I* that support for park creation was "tantamount" to "cession of jurisdiction." Moreover, the Eighth Circuit held that there were other indicia of Minnesota's "cession of jurisdiction": "the state was put on notice," "placed the state on notice," "[i]t was abundantly

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[3] More accurately, the Eighth Circuit in *Brown I* stated that Minnesota's alleged knowledge that *Congress intended that* "hunting would be prohibited throughout the park" was "tantamount to a cession of jurisdiction over the lands and the waters within the park boundaries." *Brown I*, 552 F.2d at 821 (emphasis added).

Assuming arguendo that Minnesota knew that hunting would be prohibited in the park, the Eighth Circuit may not conclude thereby that Minnesota ceded total jurisdiction over its waters, including authority to regulate commercial activities thereon. The Eighth Circuit's holding in *Brown I* fails to address whether Congress intended to usurp totally the jurisdiction of Minnesota with regard to Rainy Lake. In fact, as to commerce on Rainy Lake, there is no indication that Congress intended to usurp Minnesota's jurisdiction or that Minnesota intended to cede its jurisdiction. To the contrary, Minnesota's retention of authority over Rainy Lake in the Deed it executed to the United States demonstrates that Minnesota did not intend to cede its jurisdiction over Rainy Lake.

clear to all state legislators," "state legislators had to have known," "Minnesota . . . understood."[4] Op. at 8, 9, and 10. App. 9 to App. 11. Thereupon, the Eighth Circuit ruled that the State of Minnesota "consented to the NPS exercising jurisdiction" over Rainy Lake and that "[o]nce a state cedes jurisdiction of an area to the United States, it cannot unilaterally reassert jurisdiction." Op. at 11. App. 12.

As a further basis for its decision, again as mandated by its decision in *Brown I*, as well as its holding in *Minnesota by Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981), the Eighth Circuit cited to *Kleppe v. New Mexico*, 426 U.S. 529 (1976). The Eighth Circuit held that, under *Kleppe*, the Property Clause provides the NPS authority to regulate property belonging to the State of Minnesota: "Congress may make those rules regarding non-federal lands as are necessary to accomplish its goals with respect to federal lands." Op. at 11. App. 13.

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[4] The Deed by which Minnesota conveyed its state lands to the United States for VNP demonstrates that what "Minnesota . . . understood," with regard to Congress' intentions, was that only land was to be ceded:

> [T]he State of Minnesota has concurred with the stated purpose of Congress in authorizing the establishment of the park and has directed the donation and conveyance of State lands to the United States of America for Voyageurs National Park.

Deed at 1. App. 67.

## REASONS FOR GRANTING THE WRIT

### I. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE EIGHTH CIRCUIT AND DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS REGARDING THE SOVEREIGN RIGHTS OF STATES UNDER THE CONSTITUTION.

#### A. The Eighth Circuit's Decision Conflicts With Decisions Of This Court As To The Manner In Which A State May Cede Its Sovereignty.

Minnesota was admitted "on an 'equal footing' with the original states and so has similar ownership over these 'sovereign lands' " including "the absolute right to all . . . navigable waters and the soils under them for [Minnesota's] own common use." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997). Thus, Minnesota retains the "absolute right" to Rainy Lake.

By holding that Minnesota lost its sovereignty over Rainy Lake, the Eighth Circuit's decision strikes at the heart of an "essential attribute of [the] sovereignty" of Minnesota, that is, its jurisdiction over its navigable waters under the Equal Footing Doctrine. *Id.* As a result, the Eighth Circuit's decision conflicts with rulings of this Court.

Because "a State's title to these sovereign lands arises from the equal footing doctrine and is 'conferred not by Congress but by the Constitution itself,' " *id.*, quoting, *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977), "disposals by the United States during the territorial period are not lightly to be inferred,

and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."[5] *Id.*, quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). If the loss of an "essential attribute of sovereignty" of a territory is not to be "lightly [ ] inferred," then the "disposal[ ]" of the rights of a sovereign state may not be "inferred" at all. Nonetheless, the Eighth Circuit's decision is based, not upon "intention . . . definitely declared or otherwise made very plain," but upon a mere "inference."

In *New York v. United States*, the State of New York challenged the constitutionality of certain provisions of the Low-Level Radioactive Waste Policy Amendments Act under the Tenth Amendment and the Guarantee (Republican Form of Government) Clause of Art. IV. *New York v. United States*, 505 U.S. 144, 154 (1992). The fact that New York public officials supported adoption of the Act did not prevent this Court from holding that one provision of the Act was outside the enumerated powers of

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[5] "[B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of government," this Court held, in *Montana v. United States*, 450 U.S. 544, 552 (1981), when deciding a question of title to the bed of a navigable waterway of a new state, "a court . . . must . . . begin with a strong presumption against conveyance by the United States [of the state's sovereign right for the benefit of another], and must not infer such a conveyance unless the intention was definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream." *Id.* (citations omitted).

Congress and, thus, infringed upon state sovereignty under the Tenth Amendment.[6] *Id.* at 177, 183.

Furthermore, in *New York* this Court held that where Congress exceeds its authority relative to the states, such a constitutional departure cannot be ratified by the "consent" of state officials. *Id.* at 182. "The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." *Id.*

Thus, while this Court in *New York* refused to find "cession" of sovereignty in the support of New York officials for federal legislation, the Eighth Circuit held that Minnesota's support for the creation of VNP was "tantamount to a cession" of sovereignty. The conflict of the Eighth Circuit's holding here with the holding of this Court in *New York* is made all the more intolerable by the fact that Minnesota expressly reserved its sovereignty, while New York did not.[7]

The Eighth Circuit's decision is also in conflict with this Court's decision in *Colorado v. Toll*, 268 U.S. 228 (1925). In *Toll*, the NPS tried to regulate state and county highways passing through Rocky Mountain National

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[6] That one provision is the "take title" provision, which offered state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress. *Id.* at 175.

[7] The Eighth Circuit acknowledged in *Brown I* that Minnesota made clear that only land was ceded to the NPS and that Minnesota "expressly reserved 'all water power rights' to the state." *Brown I*, 552 F.2d at 820, fn 3.

Park. Colorado argued that the NPS could not regulate those highways "without an act of cession from [Colorado] and an acceptance by the national government."[8] *Id.* at 231. This Court agreed: "The cases cited by the [NPS] do not warrant any such extension of the power of the United States over land within a State." *Id.* The Court remanded the case to determine if there had been a "cession from the State." *Id.* at 231-232.

Like the state highway that passes through Rocky Mountain National Park in Colorado, the public byway that is Minnesota's Rainy Lake passes through VNP. Yet while this Court declined to extend "the power of the United States over land within a State," in the absence of a "cession from [Colorado]," the Eighth Circuit willingly extended "the power of the United States over [Minnesota]" in the absence of a "cession from the state." Indeed, the Eighth Circuit did so, in conflict with this Court's holding in *Colorado v. Toll*, without either a clear "act of cession" from Minnesota or "an acceptance" by Congress.

Because the holding of the Eighth Circuit that Minnesota, by implication, but not expressly, ceded its sovereignty over Rainy Lake conflicts with the holdings of this Court, this Court should grant this Petition.

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[8] Similarly, this Court held, in *Adams v. United States*, 319 U.S. 312, 315 (1943), that the United States had no jurisdiction to prosecute soldiers for a crime committed within the confines of a military camp over which the United States had not accepted or acquired exclusive or concurrent jurisdiction from the State of Louisiana pursuant to 40 U.S.C. § 255.

### B. The Eighth Circuit's Decision Conflicts With Decisions Of Other Circuit Courts Of Appeals As To The Manner In Which A State May Cede Its Sovereignty.

Since 1940, Congress has required that the United States follow a series of steps to acquire jurisdiction over state land: (1) the agency must acquire ownership of the parcel; (2) it must obtain state consent to federal jurisdiction over the parcel; and (3) it must accept the parcel either (a) by formal written acceptance to the governor of the state, or (b) by complying with the relevant state law requirements.[9] *United States v. Johnson*, 994 F.2d 980, 984-85 (2nd Cir. 1993); 40 U.S.C. § 255.

When the United States fails to accept jurisdiction according to Section 255, the United States has no jurisdiction. For example, in *Hankins v. Delo*, 977 F.2d 396, 398 (8th Cir. 1992), the Eighth Circuit upheld a district court ruling that Missouri had criminal jurisdiction within the Mark Twain National Forest because the United States had failed to follow the steps necessary to accept jurisdiction over that land. *Id.*

Thus even if Minnesota had sought to convey to the NPS ownership and jurisdiction over Rainy Lake, which Minnesota clearly did not seek to do,[10] the NPS could not

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[9] The Attorney General of Minnesota pointed out in his brief before the Eighth Circuit that cession requires compliance with Minn. Stat. § 1.046, as well as with 40 U.S.C. § 255. In the absence of such compliance, there is no cession by Minnesota and no acceptance by the United States.

[10] The Deed by which Minnesota transferred the land that became VNP to the United States makes clear that Minnesota reserved all of its rights to the water, including Rainy Lake.

claim ownership and jurisdiction over Rainy Lake until both Minnesota and the NPS complied with 40 U.S.C. § 255, as well as Minn. Stat. § 1.046. By its failure to demand compliance with federal law as to the manner in which state land is conveyed to the United States and its agencies, the decision of the Eighth Circuit is in conflict with the holdings of other circuit courts of appeals.

Because the holding of the Eighth Circuit is in conflict with the holdings of other circuit courts of appeals, this Court should grant this Petition.

### C. The Eighth Circuit's Decision Conflicts With Decisions Of This Court By Equating State Support For National Parks With Cession Of Sovereignty.

The Eighth Circuit's holding that the need "to preserve . . . the outstanding scenery" of VNP justifies the loss of Minnesota's sovereignty conflicts with holdings of this Court.[11] "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government." *New York*, 505 U.S. at 188. Moreover, even if the NPS were seeking to protect the scenery of VNP, this

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[11] Op. at 13. App. at 14. The NPS regulations have nothing to do with scenery but with regulating "business operations within VNP." *Id.* at 8. Clearly Mr. Brown was not conducting business within VNP, but was passing by in a Coast Guard-designated channel. His activities had no impact on the "outstanding scenery" of VNP. Because the NPS asserts that it may regulate tour boats on Minnesota's Rainy Lake that pass by VNP, the NPS could regulate commercial activity on a state or privately owned promontory overlooking a national park.

Court has cautioned, "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[12] *Id.* at 187.

Thus, this Court has rejected the very rationale adopted by the Eighth Circuit that power must be concentrated in the NPS, to the detriment of the sovereign rights of Minnesota, so as to "protect" VNP. As a result, the Eighth Circuit's decision is contrary to the holdings of this Court and in conflict with the requirements of the Constitution.

Furthermore, the Eighth Circuit's decision does almost fatal harm to the ability of sovereign states to support the creation of parks, wilderness areas, and other elements of the National Park System within their states. Because such support will be viewed as "tantamount" to the "cession" of state sovereignty, a governor or state legislature is forced to choose between preserving a portion of the environment for the enjoyment of future generations and protecting the constitutional guarantees

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[12] "The question is not what power the federal government ought to have but what powers in fact have been given by the people." *New York*, 505 U.S. at 157, *citing United States v. Butler*, 297 U.S. 1, 63 (1936). Thus, as this Court asked in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *Colorado v. Toll*, the questions are whether Congress clearly intended to seize Minnesota's sovereignty over Rainy Lake and whether Minnesota willingly ceded that jurisdiction, which was in turn accepted by the United States.

given the state's citizens to ensure their liberty. No public official should be compelled to make such a choice.

Because the holding of the Eighth Circuit is in conflict with the holdings of this Court and because the holding of the Eighth Circuit does grievous damage to the ability of sovereign states to support park creation, this Court should grant this Petition.

## II. A TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE EIGHTH CIRCUIT AND DECISIONS OF THIS COURT REGARDING THE PROPERTY CLAUSE OF THE CONSTITUTION.

The Eighth Circuit asserts that its view of the Property Clause is controlled by the holdings of the Eighth Circuit in *Brown I* and *Minnesota by Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981), which in turn were grounded in the decision of the Supreme Court in *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976). In *Kleppe*, says the Eighth Circuit, this Court held that "Congress may make those rules regarding non-federal lands as are necessary to accomplish its goals with respect to federal lands." Op. at 11. App. 13.

However, *Kleppe* reached no such holding. Instead, this Court first reiterated the unremarkable rule that Congress possesses plenary power to control the use and disposition of federal property. *Id.* at 538-540. This Court then ruled that this power could be used to protect wildlife on federal lands. *Id.* at 540-541. The Court refused to rule further:

> [W]e do not think it appropriate . . . to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands . . . *We . . . leave open the question of the permissible reach of the Act over private lands under the Property Clause.*

*Id.* at 546 (emphasis added).

The Eighth Circuit's holding is contrary to *Kleppe* because *Kleppe* did not determine that Congress could use the Property Clause to regulate non-federal property.

Earlier Supreme Court decisions held likewise. In *Kansas v. Colorado*, 206 U.S. 46 (1907), this Court held that "[C]learly [the Property Clause] does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the *property belonging to the United States* . . . within their limits . . . " *Id.* at 89 (emphasis added). As noted above, a similar ruling was reached in *Colorado v. Toll*, 268 U.S. 228 (1925).

The Eighth Circuit quotes *Brown I* as its authority, holding, that, in response to the desire by the United States for "needful" regulation of non-federal land, the courts "have supported an expansive reading of the Property Clause." Op. at 12, App. 13, quoting *Brown I* at 822. However, as is clear from *Kansas v. Colorado*, *Colorado v. Toll*, and *Kleppe v. New Mexico*, this Court has refused to give an "expansive reading" to the Property Clause that would allow Congress to regulate commercial activities

on state-owned property within national parks.[13] Furthermore, no other circuit court of appeals has adopted the Eighth Circuit's "expansive reading" of the Property Clause.

Because the decision of the Eighth Circuit is in conflict with the decisions of this Court, this Court should grant this Petition.

## III. THIS CASE INVOLVES A MATTER OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE – THAT IS, THE SOVEREIGNTY OF STATES – AS TO WHICH THE DECISION OF THE EIGHTH CIRCUIT IS IN TRUE, DIRECT, INTOLERABLE, AND IRRECONCILABLE CONFLICT WITH DECISIONS OF THIS COURT.

### A. The Sovereignty Of States Is A Matter Of Exceptional Importance Because It Protects Liberty.

The Eighth Circuit's holding that Minnesota impliedly, but not expressly, ceded an aspect of its sovereignty to the United States assails, contrary to the holdings of this Court, the very liberty that such sovereignty was intended, by the Constitution, to protect.

In *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), this Court held, "[I]f Congress intends to alter the 'usual constitutional balance between States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *Id.* at 460-61

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[13] Moreover, even if Congress does have such power under the Property Clause, Congress did not delegate such authority to the NPS. *See* 16 U.S.C. § 160, *et seq.*

(citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). This Court demanded such clear intent because invasion of a state's sovereign authority "is an extraordinary power in a federalist system . . . that we must assume Congress does not exercise lightly." *Id.* at 460.

This Court based its decision in *Gregory* on the protection afforded by the Constitution for state sovereignty:

> The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence . . . The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. . . . The Constitution created a Federal Government of limited powers. . . . The States thus retain substantial sovereign authority under our constitutional system. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

*Id.* at 457-58. Yet this Court does not exercise such solicitude out of concern for the state, but for the people, because "[i]n the tension between federal and state power lies the promise of liberty." *Id.* at 459.

For, as this Court held later:

> The Constitution does not protect the sovereignty of states for the benefit of the states or state governments as abstract political entities, or even for the benefit of the public officials governing the states. To the contrary, *the Constitution divides authority between federal and state*

> *governments for the protection of individuals.* State sovereignty is not just an end in itself. *"Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."* [*Coleman v. Thompson*, 501 U.S. 722, 759 (1991) Blackmun, J., dissenting.]

*New York*, 505 U.S. at 181 (emphasis added).

Because the holding of the Eighth Circuit involves a matter of exceptional importance, that is, "the promise of liberty" that lies in and is guaranteed by the sovereignty of the states, this Court should grant this Petition.

### B. The Decision Of The Eighth Circuit Is In True, Direct, Intolerable, And Irreconcilable Conflict With Decisions Of This Court.

The Eighth Circuit's holding that Minnesota impliedly, but not expressly, ceded an aspect of its sovereignty to the United States is in true, direct, intolerable, and irreconcilable conflict with decisions of this Court because the Eighth Circuit failed to determine what Congress intended by its creation of VNP and whether that intent was sufficiently clear.

This Court has held consistently that congressional intent to infringe on state sovereignty must be evidenced by a "clear statement:" "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Gregory*, 501 U.S. at 461. *See also, United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *United States v. Five Gambling Devices*, 346 U.S.

441, 450 (1953) ("unmistakable intention of Congress" is necessary to apply an act "in its most extreme impact upon affairs normally reserved to the states"); and *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 152 (1944) ("Where Congress has not clearly indicated a purpose to precipitate conflict [between federal agencies and state authority], we should be reluctant to do so by decision.").

In *Gregory v. Ashcroft*, Missouri state court judges challenged the mandatory retirement provision of the state constitution under the federal Age Discrimination in Employment Act ("ADEA") and the Equal Protection Clause of the Fourteenth Amendment. Applying the plain statement rule, this Court declined to apply the ADEA so as to supplant the sovereignty of Missouri in the establishment of qualifications for its state judges. *Gregory*, 501 U.S. at 464. "This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

In *United States v. Bass*, this Court applied the plain statement rule to reject federal intrusion upon traditional state criminal jurisdiction, *Bass*, 404 U.S. at 350:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

*Id.* at 349.

Similarly, in *United States v. Five Gambling Devices*, this Court applied the plain statement rule to "keep[ ] the Federal Government out of State and local police powers." *Five Gambling Devices*, 346 U.S. at 451. This Court required that the text of the anti-gambling act evidence the "unmistakable intention of Congress" before the Court would apply the act "in its most extreme impact upon affairs considered normally reserved to the states." *Id.* at 450.

In *Davies Warehouse Company v. Bowles*, a public warehouse challenged the application of the federal Emergency Price Control Act to regulate its rates, arguing that, as a "public utility," it fell under an exemption in the Act allowing for state regulation of the warehouse. *Davies Warehouse*, 321 U.S. at 144-45. This Court held that simplicity of administration and national uniformity in the operation of a federal law were not sufficient reasons to superimpose federal regulation where state regulation already existed. *Id.* at 153-54, 155. "[I]n no case relied upon did we achieve uniformity at the cost of establishing overlapping authority over the same subject matter in the state and in the Federal Government." *Id.* at 155. "It is a . . . serious thing to adopt a rule of construction . . . which precludes the execution of state laws by state authority in a matter normally within state power." *Id.*

There is absolutely no question but that the holding of the Eighth Circuit is in conflict with the holdings of this Court that have demanded a "clear statement" if Congress intends to alter the constitutional relationship between the United States and a sovereign state. In its creation of VNP, Congress not only failed to make "unmistakably clear" any such "intention," in fact, it did

just the opposite. Congress made it "clear" and "plain" that all that the NPS was authorized to obtain and would obtain from Minnesota was land and not water:

> That the Secretary shall not establish the park until the *lands* owned by the State of Minnesota and any of its political subdivisions within the boundaries shall have been donated to the Secretary for the purposes of the park: Provided further, That the Secretary shall not acquire other *lands* by purchase for the park prior to such donation . . . .

16 U.S.C. § 160a (emphasis added).

Remarkably, the Eighth Circuit totally failed to address either what Congress intended to do or, more importantly, whether Congress had made that intent "unmistakably clear in the language of the statute." *See Gregory*, 501 U.S. at 460. Instead, the Eighth Circuit focused exclusively on what Minnesota implied by its support for creation of VNP and what Minnesota "had to have known" would happen once VNP was created. Even if the Eighth Circuit's analysis of the intent of Minnesota were correct and, given the decision of this Court in *New York v. United States*, 505 U.S. 144 (1992), it is not correct, the issue of whether Minnesota lost its sovereignty over Rainy Lake must begin with an analysis of what Congress intended and whether that intent was "unmistakably clear." This the Eighth Circuit did not do!

Because the holding of the Eighth Circuit involves a matter of exceptional importance, that is, loss of state sovereignty as a result of an act of Congress, and because

the holding of the Eighth Circuit as to how such sovereignty may be lost conflicts with the holdings of this Court, this Court should grant this Petition.

## CONCLUSION

For all the above reasons, this Court must grant this Petition.

Respectfully submitted,

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Dated: December 9, 1999.

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**UNITED STATES of America, Appellee,**

**v.**

**Harold M. ARMSTRONG, also known as "Bo," Appellant.**

**State of Minnesota; Amicus on Behalf of Appellant,**

**Voyageurs Region National Park Association; The Wilderness Society; The National Parks and Conservation Association. Amici on Behalf of Appellee. United States of America, Appellee,**

**v.**

**Carl E. Brown, Appellant.**
**State of Minnesota;**
**Amicus on Behalf of Appellant,**

**Voyageurs Region National Park Association; The Wilderness Society; The National Parks and Conservation Association.**
**Amici on Behalf of Appellee.**

**Nos. 99-1190, 99-1191.**

United States Court of Appeals,
Eighth Circuit.

Submitted: May 12, 1999.

Filed: July 28, 1999.
Rehearing and Rehearing En Banc Denied in No. 99-1191 Sept. 10, 1999.

William P. Pendley, Denver, CO, argued, for Appellant Carl E. Brown.

Charles H. LeDue, International Falls, MN, argued, for Appellant Harold M. Armstrong.

William A. Szotkowski, Asst. Atty. Gen., St. Paul, MN, for Amicus State of Minnesota.

Clifford B. Wardlaw, Ass. U.S. Atty., Minneapolis, MN, argued, for Appellee.

Elizabeth H. Schmiesing, Minneapolis, MN, for Amici National Parks & Wilderness Society.

Before McMILLIAN, HEANEY, and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

Carl Brown and Harold "Bo" Armstrong were convicted in the United States District Court for the District of Minnesota for violating a National Park Service (NPS) regulation that prohibits conducting business operations on Rainy Lake in Voyageurs National Park (VNP) without a permit. We affirm their convictions and the sentences imposed, except that the sentence imposed on Carl Brown must be modified on remand with respect to that portion of his sentence that prohibits him from entering VNP for any purpose.

## I. Background

The VNP concept dates back to 1891 when the Minnesota Legislature requested that the President of the United States establish a national park in Minnesota between Crane Lake on the east and Lake of the Woods on the west. *See* 1891 Minn. General Laws 402-03. Progress was slow, with no significant action occurring on the request until 1960 when the state asked the NPS to study the possibility of establishing a national park

within the same area. *See* S.Rep. No. 91-1513 (1970), reprinted in 1970 U.S.C.C.A.N. 5965, 5966-67. In 1964, the area was recommended for national park designation by the NPS. *See id.* In 1968, Representative John A. Blatnik introduced enabling legislation to establish VNP in the House of Representatives. The bill died that year but was revived in 1969. *See Voyageurs Is First Water-Based Park,* Duluth News-Tribune, Jan. 24, 1971.

The establishment of VNP was authorized by the Voyageurs National Park bill ("the bill") and made contingent upon the donation by Minnesota to the Secretary of the Interior of some 25,000 acres of state-owned land lying within the boundaries of the 219,000 acre park (comprised of 139,000 acres of land and 80,000 acres of water). *See* S.Rep. No. 91-1513 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5965, 5965, 5967. The bill was passed by the House on October 5, 1970, by the Senate with minor changes on December 21, 1970, and received final approval by Congress on December 29, 1970, when the House approved the Senate's changes. *See* 116 Cong. Rec. 34,798, 34,806, 43,248, 43,773 (1970). Congressman John A. Blatnik of Chisholm, Minnesota, who first introduced the bill in Congress in 1968, was the principal author of the legislation in the House of Representatives and Walter F. Mondale was the principal author in the Senate. The legislation was signed into law as Public Law 91-661 by President Richard M. Nixon on January 8, 1971. *See Nixon Signs Voyageurs Park Bill,* Duluth News-Tribune, Jan. 9, 1971.

As an active participant in the creation of VNP, the state of Minnesota passed the necessary land donation legislation required to meet the conditions set forth in

Public Law 91-661 and otherwise encouraged the development of the park. *See* Minn.Stat. §§ 84B.01-.10 (1971). That legislation, which donated all state lands within the boundaries of the proposed VNP to the United States for the purpose of creating the park, passed the Minnesota House of Representatives on May 12, 1971, with a 108-26 vote, and the Minnesota Senate on May 16, 1971, on a 49-16 vote. *See* Einer Karlstrand, *Senate Approves Amended Voyageurs National Park Bill,* Duluth News-Tribune, May 16, 1971, at 1. On June 4, 1971, Governor Wendell Anderson signed the legislation into state law. *See* Einar Karlstrand, *Voyageurs Bill Signed By Governor,* Duluth Herald, June 4, 1971. VNP was officially established by the Secretary of the Interior on April 8, 1975. *See* 40 Fed. Reg. 15,921-22 (1975).

VNP lies along the international boundary between the United States and Canada, just east of International Falls, Minnesota. *See* S.Rep. No. 91-1513 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5965, 5965. The water portion of VNP is dominated by four large lakes, Rainy, Kabetogama, Namakin, and Crane. *See* Map, Appendix 1. Those four lakes, along with hundreds of smaller lakes, were gouged out of the landscape by the great ice sheets that shaped this entire region thousands of years ago. Taken together, these lakes and the network of connecting waterways make this region a unique and beautiful setting for a national park. *See* S.Rep. No. 91-1513 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5965, 5965. The northern boundary of VNP bisects Rainy Lake and also constitutes the border between the United States and Canada. Most of the dry-land surface of VNP is located on, or near, the Kabetogama Peninsula (103,850 acres), with a remaining

portion (35,280 acres) lying within the then-bounded Superior National Forest. *See id.*

The federal legislation creating VNP memorialized the voyageurs who traversed the land and waters along Minnesota's border with Canada:

> The purpose of this subchapter is to preserve, for the inspiration and enjoyment of present and future generations, *the outstanding scenery, geological conditions, and waterway system* which constituted a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States.

16 U.S.C. § 160 (emphasis added).[1]

Since at least December 29, 1966 – some four and one-half years before the state's donation of the land

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[1] Between 1981 and 1986, approximately 1,060,000 persons visited the park. *See* NPS Decade Reports, *Recreation Visits 1981-1990* (last modified Feb. 25, 1999) <http://www.aqd.nps.gov/stats/dec8190>. In 1997, 230,000 visits were recorded and in 1998, 250,000 visits were recorded. *See NPS, Voyageurs NP 1997, 1998* (last modified July 17, 1998) <http:// www.aqd.nps.gov/cgibin/ndCGI.exe/stats/Search Page>. Thus, approximately 200,000 persons visited VNP during these time periods. Each person spent approximately $67.50 per day. *See* Kenneth Hornback, *Voyageurs National Park 1995 Summer Visitor Use Survey* (visited June 21, 1999) <http://www.nps.gov/voya/research.htm# soc>. The visits are substantially below the estimates of 1.4 million visits per year projected by the NPS at the time VNP was established. *See 1.4 Million Expected to Visit Voyageurs the First Year,* Duluth Herald, Apr. 14, 1971, at 1.

required by Public Law 91-661 – an NPS regulation governing business operations with national parks has been in effect:

> Engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area, is prohibited.

36 C.F.R. § 5.3 (1998); *see* 31 Fed. Reg. 16,660, 16,661 (1966) (same).

As of August 10, 1996, the Secretary had given only one permit for the operation of a tour boat (a business operation) on Rainy Lake Basin. Brown applied for a tour boat permit and was denied the same by the NPS. Armstrong did not make a similar application. Both were arrested on Rainy Lake on August 10, 1996 for operating a tour boat within VNP without a permit. After a trial before a United States Magistrate on December 10-11, 1997, a judgment finding Brown and Armstrong guilty of operating a business on VNP waters without a permit was entered on April 17, 1998. The defendants appealed their convictions to the United States District Court for the District of Minnesota and that court affirmed by written order on January 5, 1999.

Brown was sentenced to 60 days incarceration and a $5,000 fine. The incarceration and the fine were stayed on the condition that Brown not violate any of the terms of his unsupervised probation. One of the terms of Brown's probation barred his presence in VNP except pursuant to an NPS permit for conducting business operations. Armstrong was sentenced to 30 days incarceration and fined

$300. His incarceration was also stayed for one year during which time he was placed on unsupervised probation.

Brown contended in the district court and contends on appeal that the Secretary lacked authority to regulate commercial operations on Rainy Lake and that therefore his conviction must be set aside. He also contends that his sentence represented cruel and unusual punishment under the Eighth Amendment. The district court held that his conviction was valid as the NPS has jurisdiction over waters within the boundaries of VNP based on Minnesota's implied cession of jurisdiction over these waters. The court further decided that the NPS citation of Brown was a proper exercise of its jurisdiction under the property and commerce clauses of the United States Constitution. Finally, the court ruled that the regulations respecting permits violated neither the Webster-Ashburton Treaty of 1842 nor the Root-Bryce Treaty of 1909.

Armstrong, a Canadian citizen, challenged his conviction contending, as did Brown, that the NPS did not have authority to regulate commercial operations in international waters within VNP, and that, in any event, the regulations violated the Webster-Ashburton Treaty of 1842 and the Root-Bryce Treaty of 1909. His arguments were also rejected by the district court. Armstrong renews those arguments on appeal.

## II. Minnesota's Cession of Jurisdiction to the NPS

In *United States v. Brown*, 552 F.2d 817, 819 (8th Cir.) (*Brown I*), *cert. denied*, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977), we decided the United States has

jurisdiction to enforce regulations controlling activities on waters within the boundaries of VNP. We reasoned that the state of Minnesota had ceded jurisdiction of the waters within VNP to the United States, and noted that the state "was an active participant in the creation of the Voyageur's National Park," passing enabling legislation and otherwise encouraging the development of VNP. *See id.* at 821. We called attention to the enabling legislation passed by the Minnesota Legislature in 1971, which stated:

> The legislature concurs with the stated purpose of . . . sections 84B.01 to 84B.10 to preserve, for the inspiration and enjoyment of present and future generations, the outstanding scenery, geologic conditions and *waterway system which constituted a part of the historic route of the voyageurs,* who contributed significantly to the opening of the northwestern United States. . . . Sections 84B.01 to 84B.10 are a necessary first step in the establishment of the park and is in furtherance of the provisions of section 101 of the act of Congress authorizing the establishment of the park.

*See id.* (emphasis added).

We are obligated to follow this court's decision in *Brown I,* and reaffirm its central holding without reservation. We remain of the view that *Brown I* correctly decided the cession issue and that this action by the state of Minnesota supports the convictions, regardless of the merits of appellants' other arguments. Accordingly, this opinion affirms the judgment of the district court on the ground that the state of Minnesota consented to the

NPS's exercise of jurisdiction over business operations within VNP, including the operation of tour boats.

The state of Minnesota initiated the creation of a national park from lands within its bounds. In 1971, Congress succumbed to the entreaties of the state and authorized the establishment of VNP subject to two relevant preconditions. First, that VNP would not be established or a legal description of its boundaries published unless the state transferred state-owned lands within the proposed boundaries to the Secretary of the Interior (Secretary). *See* 16 U.S.C. § 160a.

Second, that VNP would be established only when "the Secretary deems sufficient interests in lands or waters have been acquired for administration in accordance with the purposes of this subchapter." 16 U.S.C. § 160a. Prior to passage of the act in January 1971, the state was put on notice of Congress' intentions and the prerequisite expectations to be satisfied by the state were the deal to go through and the Park be established by the Secretary. The state took requisite measures to meet these expectations:

> The Committee has received assurances from the Governor and Attorney General that the State of Minnesota could and would make its lands available for the national park. (*See* telegram of December 19, following Departmental reports.) If this legislation is enacted into law, it is the desire of the committee that the State and its political subdivisions move without hesitation to donate these properties so that land price escalation of privately owned land will be minimal. If delays occur, creation of the park as presently envisioned may be jeopardized since

> the bill contains an appropriation authorization ceiling of $26,014,000 for land acquisition.

S.Rep. No. 91-1513, *reprinted in* 1970 U.S.C.C.A.N. 5965, 5967.

Senate Report No. 91-1513, dated December 21, 1970, placed the state on notice that the Secretary's authority would have to be recognized in the context of making appropriate and enforceable regulations for the park. In regard to the use of water craft in the proposed park, "[t]he Secretary should have adequate authority to make appropriate regulations in this regard." S.Rep. No. 91-1513, *reprinted in* 1970 U.S.C.C.A.N. 5965, 5968. Moreover, the Secretary's regulation in effect at the time the legislation was passed specifically gave the Secretary authority to regulate all business operations in VNP. *See* 36 C.F.R. § 5.3 (originally promulgated December 29, 1966 as 31 Fed. Reg. 16,660, 16,661). It was abundantly clear to all state legislators that if they voted to donate the state lands to the Secretary that VNP would be created, it would comprise not only 139,000 acres of land, but also the 80,000 acres of water in Rainy, Kabetogama, Namakin, Crane, and hundreds of smaller lakes. The state legislature had to have known that both the land and the water were necessary features of the proposed park, as the state's essential role in creation of the park was hotly debated in the legislature. Several amendments to the legislation were proposed, some of which would have killed VNP. *See Voyageurs Bill Clears House Subcommittee,* Duluth News-Tribune, April 28, 1971; Gene Lahammer, *Park Bill Causes Shouting Match in Senate Committee,* The Daily Journal (International Falls, Minn.), Apr. 22, 1971. All of these amendments were defeated. A substitute

proposal to create a state rather than a national park was likewise rejected by a substantial majority of the legislature.[2]

Neither Minnesota nor the United States expected or contemplated that the state would transfer its ownership of the lakes to the Secretary, but both understood that if the park were established, the park, including the waters, would be administered by the Secretary of the Interior in accordance with the general statutory authorities regarding the national park system. *See* S. Rep. 91-1513, *reprinted in* 1970 U.S.C.C.A.N. 5965, 5965 (noting that proposed park would be "dominated by three large lakes" including Rainy). Legislation passed by the Minnesota State Legislature in 1995,[3] eighteen years after our decision in

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[2] Contemporaneous with the vigorous and full debate accorded the legislation that would eventually become Minn. Stat. § 84B.01-.10, an alternative bill to create a Voyageurs State Park on the Kabetogama Peninsula was introduced to the Minnesota Senate and rejected. *See State Measure Proposes Park At Kabetogama*, Duluth News-Tribune, Mar. 18, 1971. Additionally, an alternative bill establishing a state planning commission to manage the land and waters in the Kabetogama, Namakin and Crane lakes area in Northern Minnesota was introduced to the Minnesota House of Representatives and rejected. *See Bill Would Set Up Planning Unit for Kabetogama Area*, Duluth News-Tribune, Apr. 20, 1971.

[3] Minnesota statute § 84B.061 provides:

> [N]one of the navigable waters within the park and the lands under them have been donated to the United States. These navigable waters include . . . Rainy . . . [L]ake[ ]. Pursuant to applicable federal and state law, navigable waters and their beds are owned by the state. Ownership of and jurisdiction over these

*Brown I*, cannot alter the fact that the state consented to the NPS exercising jurisdiction over the waters of VNP in 1971. Once a state cedes jurisdiction of an area to the United States, it cannot unilaterally reassert jurisdiction. *See Paul v. United States*, 371 U.S. 245, 264, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963); *United States v. Unzeuta*, 281 U.S. 138, 143, 50 S.Ct. 284, 74 L.Ed. 761 (1930); *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 541-42, 5 S.Ct. 995, 29 L.Ed. 264 (1885); *Yellowstone Park Transportation Co. v. Gallatin County*, 31 F.2d 644, 645 (9th Cir.); *Rogers v. Squier*, 157 F.2d 948, 950 (9th Cir.1946). Consequently, we now reaffirm our holding in *Brown I* that Minnesota ceded jurisdiction to the NPS over waters within the boundary of VNP.

## III. Constitutional and Treaty-Based Challenges To Jurisdiction

While we understand Minnesota's cession of the lands and waters comprising VNP to foreclose any argument concerning Congress' power to unilaterally enact regulations governing commercial activity within the park, we nonetheless address these arguments in the interest of finality. Brown and Armstrong argue that Congress did not have the power under the Commerce and Property Clauses of the Constitution to enact 16 U.S.C. § 1a-2(h), authorizing the NPS to "promulgate and

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> waters and their beds has not been ceded by the state, either expressly or implicitly, to the United States.

Minn. Stat. Ann. § 84B.061 (West 1999).

enforce regulations concerning boating and other activities on or relating to waters located within areas of the [NPS]." 16 U.S.C. § 1a-2(h) (1998). The district court properly ruled that Congress does have such authority and that it provides an "additional basis for jurisdiction" independent of the jurisdiction Minnesota ceded to the United States. (Memorandum and Order, at 4.)

In *Kleppe v. New Mexico*, 426 U.S. 529, 546, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976), the Supreme Court held that Congress may make those rules regarding non-federal lands as are necessary to accomplish its goals with respect to federal land. This court followed *Kleppe* in *Brown I*, where we stated:

> The crucial question is whether federal regulations can be deemed "needful" prescriptions "respecting" the public lands. This determination is primarily entrusted to the judgment of Congress, and courts exercising judicial review have supported an expansive reading of the Property Clause. In light of these general standards, we view the congressional power over federal lands to include the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands.

552 F.2d at 822. We again followed *Kleppe* in *Minnesota by Alexander v. Block*, 660 F.2d 1240 (8th Cir.1981). In *Block*, the state of Minnesota contended that Congress did not have the power to enact motorboat use restrictions on surface waters within a wilderness area. The district court rejected the state's claims and we affirmed, stating:

> Under this [Property Clause-based] authority to protect public land, Congress' power must extend to regulation of conduct on or off the

> public land that would threaten the designated purpose of federal lands. Congress clearly has the power to dedicate federal land for particular purposes. As a necessary incident of that power, Congress must have the ability to insure that these lands be protected against interference with their intended purposes.

*Id.* at 1249.

We are unable to distinguish the facts here from those in *Kleppe, Brown I,* and *Block.* In each case, Congress invested the Department of the Interior with the power and authority to impose reasonable regulations with respect to conduct occurring within the boundaries of public lands under the department's control. Here, the regulation requiring that commercial tour boat operators obtain a permit before operating commercial tour boats within VNP is well within the authority of the NPS.

Not only is the regulation relating to the permitting system consistent with the purpose of VNP,

> to preserve, for the inspiration and enjoyment of present and future generations, the outstanding scenery, geological conditions, and *waterway system* which contributed a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States,

16 U.S.C. § 160 (emphasis added), but also Congress has specifically directed the NPS that,

> in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and

> historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that . . . public accommodations, facilities, and services as have to be provided within [park system] areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that heavy visitation will not unduly impair these values,

16 U.S.C. § 20.[4]

Defendants additionally contend that regulation of tour boats in VNP violates the Root-Bryce Treaty of 1909, 36 Stat. 2448, and the Webster-Ashburton Treaty of 1842, Aug. 9, 1842, 8 Stat. 572. The 1909 treaty provides:

> The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purpose of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, *subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privileges of free navigation and applying*

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[4] Though constitutional analysis of the NPS regulation at issue here is appropriately aimed at Congress' power under the Property Clause, appellants also forward a Commerce Clause argument. Their challenge of Congress' power is unconvincing. Congress' authority to regulate commerce and to delegate significant portions of this power to the Executive Branch is well established. *See United States v. Appalachian Power Co.*, 311 U.S. 377, 426, 61 S.Ct. 291, 85 L.Ed. 243 (1940); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 59, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974).

> *equally and without discrimination* to the inhabitants, ships, vessels, and boats of both countries.

36 Stat. at 2449 (emphasis added).[5]

We disagree with defendants' contention. The treaties make clear that both the United States and Canada may adopt laws and regulations not inconsistent with the privileges of free navigation, so long as the laws and regulations are applied in a nondiscriminatory manner. Certainly, requiring a tour boat operator in a national park to obtain a permit is not unreasonable and is not inconsistent with the privileges of free navigation. Moreover, it is clear that the regulations are applied in a nondiscriminatory manner. The regulation is equally applicable to American and Canadian citizens who seek to operate a business operation in VNP.

We face here with the same argument raised by defendants in *Block*, 660 F.2d at 1240, respecting the Boundary Waters Canoe Area. In that case, we concluded that the free and open provision of the treaties did not preclude either signatory to the treaties "from enacting reasonable regulations affecting commerce along the waterways, as long as the regulations apply equally to citizens of both countries." *Id.* at 1258. In reaching this

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[5] Article II of the 1842 treaty states:

> It being understood that all the water-communications and all the usual portages along the line from Lake Superior to the Lake of the Woods; and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

Webster-Ashburton Treaty, Aug. 9, 1842, 8 Stat. 572, 574 (1842).

decision, we gave weight to an opinion of the State Department which stated:

> We believe that the intent of the "free and open" provision for these waters was to ensure that this important route remained open, on an equal basis, to the nations of both countries. It would not be correct, however, to interpret "free and open" so broadly as to prohibit either United States or Canadian authorities from imposing any limitation upon the manner in which such waterways and portages may be used. In agreeing to free and open use of these waterways and portages, neither party intended to relinquish its sovereign role of imposing statutory limitations on behavior which would not be in the best interest of the respective country.

*Id.* at 1258 (quoting Letter from Robert J. McCloskey to Hon. James L. Oberstar) (*quoted in National Ass'n of Property Owners v. United States*, 499 F.Supp. 1223, 1234 (D. Minn. 1980)) (footnote omitted).

We find no relevant difference between the BWCA regulation which precluded motorized use, except on designated lakes and rivers, and VNP regulation which prohibits business operations in VNP, except pursuant to a permit or other written agreement with the United States.[6]

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[6] At trial a park ranger testified that a Canadian tour boat would not violate 36 C.F.R. § 5.3 if it entered the Brule Narrows from the Canadian side of the border and exited back to the Canadian side of the border. This is a sensible interpretation of the regulation. *See Griffin v. Oceanic Contractors*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982) ("A statute should be construed to make sense. . . . "); *Irving v. Clark*, 758 F.2d 1260,

## IV. Sentencing

Brown contends that his fine and sentence are excessive and constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution. We disagree with one exception. One of the conditions of Brown's probation is that Brown have "no presence" in VNP except pursuant to the terms and conditions of any permits for the conduct of commercial operations granted to him by the NPS.

Brown makes two arguments as to why such conditions are violative of the Constitution. First, he states that his livelihood depends on his traveling through VNP as a federally-licensed tanker to deliver supplies to families on the lake. The short answer to this contention is that Brown can seek a permit from the NPS to operate his tanker delivery service. Thus, he will not be deprived of his livelihood if he meets VNP requirements for such a permit. Of course, Brown will have to do something that he does not want to do to obtain the permit – recognize the jurisdiction of the NPS over business operations in VNP – but we have resolved that issue and it is not a violation of either the Constitution or the sentencing guidelines to require that Brown submit to the permitting process if he desires to operate a commercial tanker delivering supplies to persons living within VNP.

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1263 (8th Cir.1985). It allows a Canadian tour boat operator to use the narrows which are in American waters to pass from Canadian waters to Canadian waters without having to obtain an American permit. Here, however, Armstrong was several miles away from the Brule Narrows in American waters.

Second, he states that it is cruel and unusual punishment to make it a condition of probation that he not enter VNP to pursue the same non-business activities that other visitors to VNP pursue. We agree. We understand that Brown has persisted for a long time in his quest to have the federal courts decide that the NPS is without authority to regulate commercial activities on the lake, but this fact is not a sufficient reason to deny Brown the same satisfaction that other visitors of VNP enjoy.

We affirm the district court with this one exception and remand the matter to the district court for the sole purpose of modifying the conditions of probation so as to permit Brown to visit VNP to engage in the same recreational and educational activities as other visitors to VNP.

## V. Remaining Issues

We have carefully reviewed the remaining issues raised by the parties and conclude that they are without merit.

## VI. Conclusion

We affirm the judgment and decision of the district court in all respects except as to the sentence of Brown and remand to the district court for the purpose of modifying his sentence.

[Map Omitted In Printing]

[Please Refer To Map On Page App. 73]

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

| | | |
|---|---|---|
| No. 99-1191MNST | * | |
| United States of America, | * | CR 98-145(2) JRT/RRB |
| Appellee, | * | Appeal from the United States District Court for the District of Minnesota |
| vs. | * | |
| Carl E. Brown, | * | |
| Appellant. | * | |

**JUDGMENT**

(Filed Sep. 21, 1999)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed, and remanded to the district court for proceedings consistent with the opinion of this court.

(5172-010199)

July 28, 1999

A true copy.

ATTEST:
/s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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UNITED STATES OF AMERICA,

Plaintiff,

v.

(1) HAROLD M. ARMSTRONG, a/k/a "Bo," and (2) CARL E. BROWN,

Defendants.

Criminal No. 98-145 (JRT/RRB)

**ORDER**

(Filed Jan 05, 1999)

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On April 27, 1998, United States Magistrate Judge Randall R. Burg entered a written order and judgment finding defendants Harold M. "Bo" Armstrong and Carl E. Brown guilty of conducting commercial operations on Rainly Lake within Voyagers National Park ("VNP"), in violation of 36 C.F.R. § 5.3.[1] Defendants admitted that, on August 9, 1996, they separately traversed waters the Government claims to be part of VNP when park rangers stopped them and issued citations for transporting paying passengers without a permit. Defendants' only submitted defense was that the National Park Service

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[1] Section 5.3 provides as follows:

> Engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area, is prohibited.

("NPS") has no authority over waters within the exterior boundaries of VNP. On July 23, 1998, the Magistrate Judge issued an Order sentencing Brown and Armstrong.[2]

This matter is before the Court on defendants' appeal of the Magistrate Judge's orders.[3] Brown and Armstrong continue to challenge the NPS's jurisdiction over activities on the waters of Rainly Lake, and Brown challenges his sentence. Having reviewed the record in this case and the submissions and arguments of the parties, the Court affirmed defendants' convictions and Brown's sentence.

The Court affirms the Magistrate Judge's conclusion that the NPS has jurisdiction over the waters within the boundaries of VNP based on Minnesota's implied cession of jurisdiction over those waters. In *United States v. Brown*, 552 F.2d 817, 821 (8th Cir.) (*"Brown I"*), *cert denied*, 431 U.S. 949 (1977), a matter involving one of the defendants in this case, the Eighth Circuit held that Minnesota's "active participation in the creation of [VNP] with

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[2] The magistrate Judge sentenced Brown to sixty days incarceration and a $5,000 fine. However, the Magistrate Judge placed Brown on three-year unsupervised probation and stayed the entire period of incarceration and $3,000 of the fine for those three years, unless Brown violated his terms of probation. One of the terms of Brown's probation is that he have no presence in VNP except pursuant to the terms and conditions of any permits for the conduct of commercial operations granted to him by the NPS. Armstrong was sentenced to thirty days incarceration and a fine of $300. His incarceration also was stayed for one year, during which he was placed on unsupervised probation.

[3] Because it finds further argument on the issues presented is unnecessary, the Court denies the defendants' request for oral argument.

the knowledge that Congress intended hunting would be prohibited throughout the park was tantamount to a cession of jurisdiction over the lands and the waters within the park boundaries." Although this case involves activities other than hunting, the Court believes that *Brown I*'s strong and clear statement regarding Minnesota's cession of jurisdiction must be construed as establishing that the United States acquired regulatory jurisdiction over the waters within VNP. Accordingly, the NPS – the regulatory agency Congress has charged with regulating the lands and waters of VNP – had jurisdiction under 36 C.F.R. § 5.3 to regulate defendants' commercial activities on the day in question.

The Court finds defendants' various arguments to the contrary are unconvincing. For example, the Court rejects defendants' reliance on Minn. Stat. § 84B.061. That statute was enacted after the *Brown I* decision and cannot operate to alter Minnesota's cession of jurisdiction at the time VNP was created. The Court further rejects defendants' contention that 16 U.S.C. § 160a (VNP's authorizing statute) indicates Congress only wished to exercise authority over the lands within VNP, not its waters. A close reading of the statute reveals otherwise: Congress not only provided that the Secretary of the Interior was to purchase lands from Minnesota to establish VNP, but also stated that the secretary was to establish VNP after sufficient interests in "lands or waters" were acquired. *See* 16 U.S.C. § 160(a). This reference to interests in waters clearly contemplates acquisition of regulatory jurisdiction over such waters. In addition, defendants' reliance on the Webster-Ashburton Treaty of 1842 and the Root-Bryce Treaty of 1909 is misplaced because neither of these

treaties prevents the United States from regulating its own waters, as long as those regulations apply equally to both its and the other signatory's nationals. *See United States v. Block*, 660 F.2d 1240, 1258-59 (8th Cir. 1981), *cert denied*, 445 U.S. 1007 (1982). Finally, there is nothing in the record that suggests that the NPS citations at issue in this case offend international treaties or agreements, or in any other way exceed the limitations set forth in 16 U.S.C. § 160(i).

Furthermore, as an additional basis for jurisdiction, the Court concludes that the NPS's citation of defendants under 36 C.F.R. § 5.3 was a proper exercise of its jurisdiction under the Property and Commerce Clauses of the United States Constitution. Pursuant to its authority under these clauses, Congress enacted 16 U.S.C. § 1a-2(h), authorizing the NPS to "promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States. . . . "[4] Enforcement of section 5.3, which provides for the NPS's regulation of commercial boating in VNP, is, in turn, a proper exercise of the agency's

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[4] The Court rejects defendants' contention that § 1a-2(h) renders § 1a-6(e) superfluous. The latter section merely acknowledges the states' concurrent authority to exercise civil and criminal jurisdiction within the National Park System. *See* § 1a-6(e) ("Nothing [contained in this Act] shall be construed or applied to affect any right of a State or a political subdivision thereof to exercise civil and criminal jurisdiction within the National Park Service."). It obviously does not prevent the NPS from exercising jurisdiction.

authority delegated under § 1a-2(h).[5] Thus, the Court rejects defendants' jurisdictional arguments and affirms their convictions.

The Court also rejects Brown's claim that the Magistrate Judge's sentence constitutes cruel and unusual punishment under the Eighth Amendment. There is no dispute that his sentence is within the applicable range set forth in the Federal Sentencing Guidelines. Contrary to Brown's assertions, this case does not present "extraordinary circumstances" that render his sentence cruel and unusual despite the fact that the sentence falls within the limits prescribed by law. The Magistrate Judge's sentence is an appropriate and measured response to Brown's actions, particularly in light of his pattern of misconduct. Moreover, Brown's contention that the portion of the sentence forbidding him from conducting commercial ventures into VNP without a permit is unduly burdensome is specious. Like any other person, he must seek a permit to conduct such activities. His response that he cannot seek a permit because the NPS has no jurisdiction to issue such a permit obviously is without merit, given this Court's determination that the NPS possesses such jurisdictional authority.

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[5] *See, e.g., Brown I,* 552 F.2d at 822-23 (holding that the regulation at issue in that case was a valid prescription under the Property Clause, "designed to promote the purposes of federal lands within the national park"); *see also Block,* 660 F.2d at 1248-51 (concluding that the regulation of motorboat in the Boundary Waters Canoe Area is a valid exercise of authority under the Property Clause because it protects the purpose for which Congress reserved the land.)

**ORDER**

Based on the foregoing, and all of the records, files, and proceedings herein, **IT IS HEREBY ORDERED:**

1. Defendants' requests for oral argument [Docket Nos. 37 and 35 respectively] are **DENIED**.

2. The Magistrate Judge's Order dated April 27, 1998 [Docket No. 18], finding defendants guilty of conducting commercial operations on the waters of VNP on August 10, 1996, in violation of 36 C.F.R. § 5.3 is **AFFIRMED**.

3. The Magistrate Judge's Order regarding sentencing dated July 21, 1998 [Docket No. 22] is **AFFIRMED**.

Dated: January 5, 1999.

/s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>CARL E. BROWN,<br>Defendant, | ) | Violation Notice:<br>P006608 |
| and | | |
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>HAROLD M. ARMSTRONG,<br>Defendant. | ) | Violation Notice:<br>P006607 |

These matters came on before the undersigned, a Part-time United States Magistrate-Judge, on the 30th day of June, 1998, at the Koochiching County Courthouse at International Falls, Minnesota. The defendants appeared personally. Appearing with Carl E. Brown was his counsel, Todd S. Welch, Esq., of Denver, Colorado. Appearing with Harold M. Armstrong was his counsel, Charles H. LeDuc, Esq., of International Falls, Minnesota.

Appearing on behalf of the United States of America was Clifford Wardlaw, Esq., Assistant United States Attorney for the District of Minnesota.

The defendants were each afforded the opportunity to exercise their right of allocution and to be heard in

mitigation, pursuant to Federal Rules of Criminal Procedure, Rule 58(c)(3). Counsel for the defendants presented comments to the Court on behalf of their respective clients. Evidence was received from the United States regarding costs incurred during the investigation and trial of these matters.

Based on all the matters of record in these cases, the Court pronounced the following sentences:

UNITED STATES OF AMERICA VS. CARL E. BROWN

On this, his third willful violation of National Park Service regulations governing the Voyageurs National Park, Carl E. Brown is sentenced to sixty (60) days incarceration and a Five Thousand and 00/100 Dollars ($5,000.00) fine, provided, however, that the entire period of incarceration and Three Thousand and 00/100 Dollars ($3,000.00) of the fine are stayed for a period of three (3) years, and the defendant is immediately placed on unsupervised probation for that period, unless the probation is revoked or he is earlier discharged. The terms and conditions of Brown's probation are as follows:

1. That he be law abiding and violate no federal, state, or local law or ordinance.

2. That he pay costs of prosecution in the amount of Two Thousand Eighty-five and 53/100 Dollars ($2,085.53), that sum representing the costs of the appearance of seasonal ranger Matt Urch, and salary for one hour's testimony and court appearance by the following witness: McKeeman, Evans, Johnson, and Little.

3. That during the period of his probation, the defendant have no presence on the lands or waters within the exterior boundaries of the Voyageurs National Park, save and except pursuant to the terms and conditions of any permits for the conduct of commercial operations which may be granted him by the National Park Service.

4. That defendant pay the costs of prosecution and the fine on or before August 31, 1998, unless a stay of execution has been granted pursuant to Federal Rules of Criminal Procedure, Rule 38.

UNITED STATES OF AMERICA
VS. HAROLD M. ARMSTRONG

On this, his first violation of National Park Service regulations governing Voyageurs National Park, Harold M. Armstrong is sentenced to thirty (30) days incarceration and a Three Hundred and 00/100 Dollars ($300.00) fine, provided, however, that the entire period of incarceration is stayed for a period of one (1) year, and the defendant placed on unsupervised probation for that period, unless the probation is revoked or he is earlier discharged. The terms and conditions of Armstrong's probation are as follows:

1. That Armstrong be law abiding and violate no federal, state, or local law or ordinance.

2. That Armstrong pay costs of prosecution in the sum of Two Hundred and 00/100 Dollars ($200.00).

3. That the fine and cost obligations shall be paid on or before August 31, 1998, unless a stay of execution is

earlier granted pursuant to Federal Rules of Criminal Procedure, Rule 38

DATED this 21st day of July, 1998.

/s/ Randall R. Burg
Randall R. Burg
U. S. Magistrate-Judge
(Part-time)

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FIFTH DIVISION

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UNITED STATES OF AMERICA,

Violation Notice P006608

Plaintiff,

vs.

CARL E. BROWN,

Defendant.

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UNITED STATES OF AMERICA,

Violation Notice P006607

Plaintiff,

vs.

HAROLD M. ARMSTRONG,

Defendant.

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These matters were consolidated for trial and came on before the undersigned, a Part-time United States Magistrate-Judge, on December 10 through 11, 1997, at the Koochiching County Courthouse in International Falls, Minnesota. Appearing for the United States was Clifford Wardlaw, Esq., Assistant United States Attorney for the District of Minnesota. Defendant Carl E. Brown appeared personally and through his counsel, Todd S. Welch, Esq., of Denver, Colorado. Defendant Harold M.

Armstrong appeared personally and through his counsel, Charles H. LeDuc, Esq., of International Falls, Minnesota.

Based on the testimony and exhibits received at trial, the oral and written arguments of counsel, the file, and all of the proceedings herein, the Court makes the following Findings and Order:

## FINDINGS

Pursuant to the facts found and the reasoning offered in the attached Memorandum, the Court finds the above-named defendants each guilty of conducting commercial operations on the waters of the Voyageurs National Park on August 10, 1996, in violation of 36 C.F.R. § 5.3.

## ORDER

1. The defendants shall appear before the undersigned for sentencing on the 17th day of June, 1998, at the Koochiching County Courthouse in International Falls, Minnesota.

2. At least one week prior to the sentencing date, counsel for the parties shall serve upon opposing counsel and file with the Court any written sentencing argument they may wish the Court to consider, speaking to the following questions:

   a. May the Court impose as an incident of sentence the obligation to pay witness fees and expenses necessarily incurred by the United States Government in the trial of these matters?

   b. May the Court stay or suspend execution of any part of any sentence imposed on these matters upon the condition of the defendants' exclusion

from the lands and waters of the Voyageurs National Park for a determinate period of time?

DATED this 27th day of April, 1998.

/s/ Randall R. Burg
Randall R. Burg
United States Magistrate-Judge
(Part-time)

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MEMORANDUM

Carl Brown continues to challenge the authority of the National Park Service over the waters within the exterior boundaries of the Voyageurs National Park. The fight is now in its third decade. Brown's ally in this round of the struggle is Harold "Bo" Armstrong, a citizen of Canada.

On August 9, 1996, Brown and Armstrong announced their common intention to traverse Voyageurs National Park by water in their respective tour boats. Each would carry paying passengers. Both would leave from points outside the park and then cruise through the park for ultimate destinations outside the park. The trip took place the following day. Neither defendant had a permit from the National Park Service to operate a tour boat within the park.

Once inside the park's boundaries, defendants' boats were stopped by park rangers. The tour boat passenger manifests were seized. Brown and Armstrong were each

issued a citation for violating 36 C.F.R. § 5.3. That regulation prohibits conducting a business operation in a park area without a permit.

Brown, as he has in the past, challenges the existence of *any* National Park Service jurisdiction over the waters inside the Voyageurs National Park. He denies that there was ever any cession of state jurisdiction over those waters to the federal government in connection with the park's creation.[1] In his view, the statutory and regulatory enactments of Congress and the Department of the Interior lack any fundamental jurisdictional basis, at least as they purport to limit commercial activities on waters within the park.

In addition, Brown and Armstrong defend their tour boat operations as an exercise of commercial rights guaranteed under two international treaties: The Webster-Ashburton Treaty of 1842, and the Root-Bryce Treaty of 1909. Those treaties' broad protections cannot, they believe, be undermined by mere administrative agency regulation.

## DISCUSSION

In 1977, the United States Court of Appeals for the Eighth Circuit rejected Brown's first attack on the regulatory authority of the National Park Service over the waters in the Voyageurs National Park. *U. S. vs. Brown*, 552 F.2d 817 (hereafter "Brown I"). In so doing, that Court

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[1] There is no question that the State of Minnesota ceded ownership and jurisdiction over land within the park's boundaries. *See:* Minn. Stat. § 84B.03, subd. 1.

also rejected a significant part of the legal analysis of United States District Judge Miles Lord, who first reviewed the case.

Judge Lord had concluded, as a matter of fact and law, that the State of Minnesota had *not* ceded any jurisdiction over the waters within the park at the time of its creation: "This Court agrees that Minnesota has not ceded jurisdiction over the waters to the United States." *U. S. vs. Brown,* 431 F. Supp. 56 (1976). The Court of Appeals, however, reached precisely the opposite conclusion on this question. The Court of Appeals found an implied general cession of state jurisdiction over both the lands *and* the waters within the park's boundaries. That implied cession was inherent in Minnesota's capitulation to Congressional insistence that all hunting be banned within the proposed national park:

> [T]he state's active participation in the creation of Voyageurs Park with the knowledge that Congress intended that hunting be prohibited throughout the park was *tantamount*[2] to a cession of jurisdiction over the lands *and the waters* within the park boundaries. *Brown I* at 821 (emphasis added).

The remainder of the Court of Appeals' opinion in *Brown I* presented an alternative justification of the federal hunting ban based on the Property Clause of the United States Constitution (Article IV, Section 3, Clause

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[2] "Tantamount": Equivalent as in value, force, effect, or signification. To amount to as much itself. From the Italian *tanto montare:* To amount to as much. *Random House Dictionary of the English Language* (Second Edition – unabridged), page 1942.

2). That Property Clause analysis proceeded from the Court's forensic assumption that the jurisdictional finding it had just made was wrong:

> Assuming arguendo that the state did not cede jurisdiction over the waters in the park, we further conclude that the federal regulations prohibiting hunting in Voyageurs Park were a constitutional exercise of congressional power under the Property Clause. *Brown I* at 821.

In its alternative holding, the Appeals Court upheld the hunting ban as a valid, albeit extraterritorial, exercise of Property Clause power over *non-federal* waters undertaken to protect federal park lands. The Court relied upon the then recent U. S. Supreme Court case, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), to provide the analytical underpinnings for its alternative holding. *Brown I* at 821-823.

Approximately two months later, the United States Supreme Court denied Brown's petition for a Writ of Certiorari. 97 S. Ct. 2666 (May 31, 1977).

Because of the Eighth Circuit's alternative holdings in *Brown I*, Carl Brown has understandably concluded that the legal significance of that case is unclear, and may fairly be construed to be limited in authority to the specific regulation at issue in that case. Thus, the ambiguity of the Court of Appeals' position on the nature and extent of Minnesota's cession of jurisdiction has spawned 21 years of continuing uncertainty and controversy. It has prompted off-setting efforts on all sides to buttress or to undermine the legal foundations of the implied cession of jurisdiction declared in *Brown I*. Those efforts have

become more blatant since this Court ruled on Brown's last challenge in 1994.[3]

In the ensuing 1995 legislative session, the Minnesota State Legislature passed *Laws*, 1995 c. 124 (now codified as Minn. Stat. § 1.0451 and § 84B.061). That enactment asserted that the State never ceded to the United States, either expressly or implicitly, its ownership of and jurisdiction over the navigable waters within the Voyageurs National Park.[4] The legislation went on to charge the

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[3] A copy of the Order and Memorandum dated March 29, 1994, is attached hereto as Appendix I.

[4] Of the scores of members of the Minnesota House and Senate in 1995, only five were then serving who had also been Minnesota legislators when the enabling legislation for the Voyageurs National Park was passed in 1971: Senator Roger Moe (now Senate Majority Leader); Senator Florian Chmielewski (now retired); District 3A Representative Irv Anderson of International Falls (1995 Speaker of the House of Representatives and author of H.F. 54, which became *Laws* 1995 c. 124); Representative James Rice (since deceased); and, Representative Willard Munger of Duluth (Minnesota's longest-serving legislator, presently in his 42nd year of service). *Compare Laws* 1971, Volume 1, pages xi-xv, with *Laws* 1995. It is these individuals, presumably, who could speak with authority in 1995 regarding the 1971 Minnesota Legislature's intent regarding cession of exclusive jurisdiction within the proposed Voyageurs Park. However, of these men, only Moe, Chmielewski, and Anderson voted for H.F. 54. Representatives Munger and Rice cast no vote on the measure. The House vote on H.F. 54 was 96 to 31; the Senate vote was 44 to 22. *See: 1995 Journal of the Minnesota Senate*, pages 2789-2790, and *1995 Journal of the Minnesota House of Representatives*, page 2052.

There was a sixth individual who had been a Minnesota legislator in 1971 who could have played a meaningful role in 1995 in enunciating the 1971 legislature's intent. In 1971, Arne

governor, the attorney general, other constitutional officers, and other public officials, such as the Commissioner of Natural Resources, to "vigorously assert and defend, in all forums, the State's ownership and jurisdiction over these waters." Finally, the legislation specifically directs the attention of those state officials to the "free rights of travel" under the same treaties Brown and Armstrong plead in their defense here.

The Department of the Interior has not been idle either. In 1995-1996, the National Park Service promulgated amendments to "clarify" its general regulations applicable to navigable waters within park boundaries. In the preamble to those amendments, the Park Service staked out its claim of general regulatory authority over navigable waters within park boundaries. It said:

> . . . [F]ederal authority to regulate within the ordinary reach of these waters is based on the commerce and property clauses of the United States Constitution, not ownership. Like the United States Coast Guard, NPS exercises authority over navigable waters irrespective of ownership. . . . [5] 61 F.R. 35133, 35134 (1996).

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Carlson was representing District 36 in the Minnesota House. *See: Laws* 1971, page xiii. In 1995, Arne Carlson was the Governor of the State of Minnesota. As Governor, he let H.F. 54 become law without his signature on May 11, 1995. *See: Laws,* 1995 c. 124.

Thus, the capacity of the 1995 Minnesota Legislature to clarify or even speak to the intent of the 1971 Minnesota Legislature seems, as a matter of fact, uncertain at best.

[5] It is worthwhile to note that Brown has always recognized the authority of the Coast Guard on the waters within Voyageurs Park.

All of these conflicting state and federal efforts to assert claims of jurisdictional authority find their roots in the Eighth Circuit Court of Appeals' unwillingness to deliver one clear jurisdictional holding in *Brown I*. If the jurisdictional issue is ever clearly and unqualifiedly resolved, there *may* be an end to Brown's challenges; if it is not, there will never be an end to those challenges.

This Court, therefore, begins analysis of the present case from the first principle that the United States acquired jurisdiction over the waters within the Voyageurs National Park in 1971 through an unexpressed, but actual, cession of jurisdiction by the State of Minnesota. That is what the Eighth Circuit Court of Appeals concluded in *Brown I*, and this subordinate court is bound by that conclusion, however tentatively it was expressed in 1971.[6]

The National Park Service is the administrative agency that the Congress has charged with the responsibility of regulating the lands and waters of the Voyageurs National Park. That authority is to be exercised according to policies and principles common to all national parks. It is also to be exercised to accomplish the specific purpose for which the Voyageurs National Park was created. 16 U.S.C. § 160.

Among the general regulatory powers granted by Congress to the National Park Service is the authority to

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[6] In any event, it [sic] certain that the present judges of the Eighth Circuit Court of Appeals will have an opportunity to restate clearly or renounce utterly the jurisdiction holding in *Brown I* when they review the present case.

regulate commercial providers of accommodations, facilities, and services within national parks. 16 U.S.C. 20. The Park Service does so through the issuance of a limited number of permits and concessions. It so limits commercial activity because Congress has found that the unregulated conduct of commercial operations within national parks would impair the fundamental purpose of all national parks: "The conservation of scenery, wildlife, national and historic objects" in order to provide "for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations." *Id.*

Brown and Armstrong had no permit to conduct tour boat operations on the waters of Voyageurs National Park on August 10, 1996. They are, therefore, guilty of violating 36 C.F.R. § 5.3.

The provisions of the Webster-Ashburton Treaty of 1842 and the Root-Bryce Treaty of 1909 do not alter the Court's conclusion that Brown and Armstrong are properly convicted of a violation of 36 C.F.R. § 5.3. Those treaties, which relate to the boundary waters common to the United States and Canada, do not preclude each signatory sovereign from subsequently enacting regulations governing their own nation's waters and the activities thereon, so long as those regulations apply evenhandedly both to their own and the other signatory's nationals. *U. S. v. Block,* 660 F.2d 1240 (8th Cir. 1981). That Brown and Armstrong's stand in the dock together is the clearest proof of such nondiscriminatory enforcement of law.

## CONCLUSION

The past efforts of this Court have not extinguished the legal controversy surrounding National Park Service authority over the waters in the Voyageurs National Park. As noted, the 1994 decision may merely have "heaped coal on the fire."

It will require an unequivocal decision of the Eighth Circuit Court of Appeals on the jurisdictional question if the controversy is ever to be brought to an end. Meanwhile, this Court has the same hope it held four years ago: That whatever the course of the controversy, the beauty and value of the Voyageurs National Park not be harmed or diminished.

R.R.B.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARL E. BROWN,

Defendant.

Violation Notice P363422

**ORDER AND JUDGMENT**

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This matter came on before the undersigned, a part-time Magistrate-Judge for the District of Minnesota, on defendant's Motion to Dismiss. The defendant appeared personally and through his counsel, Charles H. Le Duc, Esq., of International Falls, Minnesota. Appearing for the United States of America was Friedrich A. P. Siekert, Esq., Assistant United States Attorney. Based on the Stipulation of Facts, the affidavits and exhibits of record, the written and oral arguments of counsel, and all the files and proceedings herein, the Court makes the following Order and Judgment:

1. That defendant's Motion to Dismiss be, and hereby is, *denied*.

2. Pursuant to paragraph 9 of the Stipulation of Facts, the Court adjudges the defendant *guilty* of the offense alleged in Violation Notice P363422.

3. Defendant may post $50.00 collateral by May 3, 1994, for forfeiture in lieu of further appearance in relation to sentencing in this matter on that date. Proof of

timely filing of an appeal in this matter, together with the posting of a certified check or money order in the amount of $50.00 will stay final forfeiture of that collateral pending final determination of the appeal.

DATED this 29th day of March, 1994.

/s/ Randall R. Burg
Randall R. Burg
U. S. Magistrate Judge
(Part-time)

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MEMORANDUM

Defendant Carl Brown is charged with a violation of 36 C.F.R. § 5.3. The matter comes before the Court on defendant's Motion to Dismiss. The parties have stipulated to various facts and evidence. It has been further agreed that should the Court deny Brown's motion, "that he is subject to a finding of guilty and the imposition of a fine and/or other penalties. . . . Stipulation of Facts, paragraph 9.

BACKGROUND

For the past 18 years, Carl Brown has fought to eliminate what he sees as illegal federal regulation of the waterways within the Boundary Waters Canoe Area and the Voyageurs National Park. Mr. Brown seeks to continue the tradition of water-borne commerce begun over 300 years ago on these lakes and rivers by French trappers and traders.

At issue in this case is the regulation of the National Park Service prohibiting unauthorized business operations "in park areas." 36 C.F.R. § 5.3. Mr. Brown does not dispute that he violated the regulation by operating an excursion boat business in park areas without a permit. Stipulation of Facts, paragraph 5. Rather, he attacks the legal foundations of the regulation on three grounds.

First, he maintains that the United States never acquired jurisdiction over these waters from the State of Minnesota. Second he argues that the regulation conflicts with and must, therefore, yield to the provisions of two treaties: The Webster-Ashburton Treaty of 1842 and the Root-Bryce Treaty of 1909.

Finally, Brown characterizes the regulation as an unreasonable, overbroad, and, therefore, illegal exercise of authority under the Property Clause of the United States Constitution.

## JURISDICTION

Mr. Brown mounted his first unsuccessful challenge to National Park Service authority over the waters within Voyageurs National Park over 18 years ago. *United States v. Brown*, 431 F.Supp. 56 (1976). Then, as now, Brown argued that the State of Minnesota never ceded its sovereignty over the waters within the park to the United States. That Brown raises the same argument again now is, in a way, not surprising. By the language and structure of its decision on Brown's first challenge, the Eighth Circuit Court of Appeals seemed to leave lingering questions on the sovereignty issue. *United States v. Brown*, 552 F.2nd 817 (1977).

The Court of Appeals' legal analysis in *Brown I* case began with a frank concession: "In this case, it is not abundantly clear that the State of Minnesota ceded jurisdiction over the waters of the park to the United States." *Id.* at 820. In fact, that Court went further and acknowledged: "The State of Minnesota did not *expressly* cede jurisdiction over the waters of the park to the United States. *Id.* at 821 (emphasis added).

The Court of Appeals concluded, nevertheless, that the State of Minnesota had, by implication and operation of law,[1] *completely* ceded its sovereign jurisdiction over all uses of the waterways within the park. Minnesota had done so by capitulating to a Congressional ultimatum regarding hunting within the park.

The bill first offered in Congress to authorize the park had preserved both waterfowl and big game hunting as authorized park uses. *See,* Exhibit 7 to defendant's initial memorandum. The Secretary of Interior, as well as the House subcommittee to which the legislation was referred, rejected this part of the bill. The State of Minnesota was presented with a choice: a national park without hunting or no national park at all. The hunting provision was deleted. The State proceeded with *land* transfers for the park pursuant to Minnesota Statutes Chapter 1.

From the particular legislative history of the hunting controversy, the Court of Appeals reached a very broad

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[1] "Operation of law. The term expresses the manner in which rights, and sometimes liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or co-operation of the party himself." Black's Law Dictionary (Fifth Edition), page 985.

conclusion. That conclusion disposed of Minnesota's sovereign jurisdiction over the use of waterways within the park:

> The state's active participation in the creation of Voyageurs Park with the knowledge that Congress intended that hunting would be prohibited throughout the park was tantamount to a cession of jurisdiction over the lands and waters within the park boundaries. *Id.* at page 821.[2]

The Court of Appeals immediately buttressed its broad finding of an implied cession of sovereignty with an alternative holding:

> Assuming *arguendo* that the state did not cede jurisdiction over the waters in the park, we further conclude that the federal regulations prohibiting hunting in Voyageurs Park were a constitutional exercise of congressional power under the Property Clause. *Id.*

This alternative holding has invited further litigation by Brown on the sovereignty question.

In the present case, Brown seeks to have the sovereignty analysis in *Brown I* confined to the one use (hunting) actually presented in the facts of that case. So to limit *Brown I's* holding would be completely consistent with logic, but at odds with the legal principle of *stare decisis*.

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[2] The Court of Appeals' conclusion of an implied cession of state sovereignty to the federal government in *Brown I* should be contrasted with that same Court's rigorous view of the express prerequisites to a federal cession of sovereignty to a state. See, for example, *Citizens and Landowners Against the Miles City/New Underwood Powerline v. United* States, 683 F.2d 1171 (8th Cir. 1982).

However suspect the reasoning of *Brown I*, that case squarely held that the State of Minnesota had ceded jurisdiction over the lands and waters within the park boundaries. That the Court of Appeals immediately invoked the Property Clause as an alternative justification for the hunting prohibition at issue there, did not alter or limit the sweeping legal conclusion on sovereignty.

In *United States v. Title Insurance and Trust Company*, the United States Supreme Court succinctly set forth the legal effect of an alternative ruling by an appellate court:

> . . . where there are two grounds upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.' 65 U.S. 472, 44 S.Ct. 621 (1924) at 486, 623.

This Court is bound to obey the sovereignty decision of the Eighth Circuit Court of Appeals in *Brown I*. This is not so simply because of this Court's subordinate rank in the hierarchy of the federal judiciary. Rather, it is because the due administration of justice requires that once an issue has been deliberately examined and directly decided by a court of competent authority, the matter should be considered settled.

## THE TREATIES AND THE REGULATIONS

The boundary waters that lie between the United States and Canada are regulated, in part, by the provisions of the Webster-Ashburton Treaty of 1842 and the

Root-Bryce Treaty of 1909. These treaties, Brown maintains, expressly guarantee to him the right of "free navigation" and the "free and open" conduct of commerce along the border waterways. 36 C.F.R. § 5.3 limits commercial activity on that portion of the boundary waters lying within the Voyageurs National Park. Brown believes, therefore, that the regulation illegally infringes on the treaty guarantees. The Court disagrees.

These treaties are a shield for the nationals of each signatory against the discriminatory enforcement of laws by the other signatory state. The treaties are not a sword to be seized by a private citizen and turned upon his own national government's later efforts to regulate domestic matters.

Brown lacks direct legal standing to claim a breach of the treaties. *See*, Restatement (2nd) of the Foreign Relations Law of the United States, § 115 (1965). More importantly, Mr. Brown cannot invoke general treaty provisions to frustrate more recent specific federal authority regulating commercial activity within Voyageurs National Park. See, generally: *The Chinese Exclusion Case*, 130 U.S. 600 (1889). That an agency regulation, rather than an Act of Congress, is at issue here does not alter the Court's conclusion. 36 C.F.R. § 5.3 was promulgated years after the treaties and years before the creation of Voyageurs National Park. At the park's creation, Congress specifically directed the Secretary of Interior to administer the park in accordance with prevailing regulatory authority, including 36 C.F.R. § 5.3. Public Law 91-661, § 301(a). Congress did so knowing that the Interior Department strongly emphasized preservation over commercial exploitation of national park resources:

> If an area is to be accorded the dignity and stature of designation as a national park, then many . . . commercial uses . . . must be subordinated to the larger achievement of preservation. Letter of Walter J. Hickel, Secretary of Interior, to Honorable Wayne N. Aspinall, Chairman, House Committee on Interior and Insular Affairs (May 27, 1970).

## THE PRIVATE INTERESTS OF MR. BROWN AND THE PUBLIC INTEREST OF THE UNITED STATES

Article IV, Section 3, Clause 2, of the United States Constitution states:

> Congress shall have Power to . . . make all needful Rules and Regulations respecting Property belonging to the United States.

The United States has acquired jurisdiction over the lands and waters in the Voyageurs National Park. *Brown I, supra*. Brown recognizes certain forms of federal regulatory authority in these waters: the United States Coast Guard, the Customs Service, and the Immigration and Naturalization Service. *See*: Brown letter brief of May 28, 1993, page 2. Brown, however, rejects the broad authority of the National Park Service to regulate Commercial enterprise in the Voyageurs National Park. *Id*. page 3. The exercise of that authority has imposed strict limits on commercial access to the park's waterways, and to the tourists who will pay to see them. Brown believes that 36 C.F.R. § 5.3, as applied here, arbitrarily deprives him of an historic right to engage in commerce on these waters:

> The National Park Service should not be granted the power to regulate commerce in these waters

> in the manner it is attempting to do so in this case . . . The National Park Service is not the proper party or power to regulate commerce or navigation and has no business attempting to do so under the facts and circumstances of this case . . . The government's argument would permit the Park Service to regulate a commercial activity everywhere inside a 219,000 acre park without any kind of specific showing that particular areas of park *land* would be adversely effected by the regulatory activity. This decision expressly includes 80,000 acres of lakes, and attempts the regulation in the face of three centuries of use commercial to the contrary, on the water. Defendant's letter brief (May 28, 1993), page 3;6.

In essence, Brown's claim is that 36 C.F.R. § 5.3 deprives him of a substantive right to engage in the excursion boat business without due process of law.

In the early years of this century, the doctrine of substantive due process was frequently invoked to block regulatory "interference . . . with the ordinary trades and occupations of the people." *Lochner v. New* York, 198 U.S. 45 (1904) at 63. Since the mid-1930s, however, a different view has prevailed. It is now well established that the federal government may properly promote the public welfare by laws and rules regulating business activity. Congressional regulatory authority has been broadly delegated to an increasing number of administrative agencies. It is not unusual for several federal agencies to have separate and concurrent authority over a particular commercial activity. In assessing the legality of such federal regulatory efforts, courts must accord broad deference to the judgments of both Congress and the administrative

agencies Congress has created and empowered. This is particularly so when that federal authority regulates activity occurring on federal property:

> The guarantee of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia v. New* York, 291 U.S. 502 (1934) at 525.

Congress expressly declared its purpose in creating Voyageurs National Park:

> The purpose of this act is to preserve for the inspiration and enjoyment of present and future generations, the outstanding scenery, geological conditions, and waterway system which constituted a part of the historic route of the Voyageurs. . . . Public Law 91-661.

To accomplish this appropriate purpose, Congress directed the Secretary of Interior to administer the park in accordance with 16 U.S.C. 1-4.

16 U.S.C. 1-2(h) empowers the Secretary of Interior to "promulgate and enforce regulations concerning . . . activities on or relating to waters within areas of the National Park System." Pursuant to that authority, the Secretary has limited the number and operations of commercial excursion boats within the park. The reasons for these regulations are set out in paragraphs 8-11 of the Affidavit of Chief Ranger Bruce McKeeman.

Chief Ranger McKeeman's affidavit details the National Park Service's reasons for limiting excursion boat operations to approved concessionaires: to promote

passenger safety; to assure reliable service, and; to maintain high quality standards. Most importantly, the regulation of commercial operations reduces the risks to the park's natural resources (i.e., wildlife, geologic features) inherent in unlimited market access and unrestricted competition.

It may be true that the general congressional policy of preservation could be as well-served in Voyageurs by less stringent or park-specific commercial regulations. Even if true, regulatory changes cannot and will not be compelled here. There is a legitimate federal interest in preserving the waterways of the Voyageurs National Park from unregulated and indiscriminate use. 16 U.S.C. 20. The means adopted, pursuant to 36 C.F.R. § 5.3, bear a reasonable relation to the accomplishment of that purpose. The Court's inquiry into less-restrictive alternatives ends there:

> The government is under no obligation to adopt the least restrictive alternative . . . rather, the government interest and the regulations sought to be enforced must have 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is in proportion to the interest served.' *Washington Tour Guides v. National Park Service*, 808 F.Supp. 877 (D.D.C. 1992), quoting *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) at 480.

## CONCLUSION

Much has changed since Mr. Brown's first challenge to the Park Service's authority in the Voyageurs Nationai Park. The policy of preservation so dominant in the 1970s is now pressed hard by the economic concerns of the 1990s. New judges sit on the Eighth Circuit Court of Appeals. Brown's State Senator and State Representative currently occupy powerful positions in the Minnesota Legislature. They have previously sought to intervene in this action, and may renew that effort. All these facts and others may produce significant legal changes as this case goes forward. It is this Court's sincere hope that any such changes will not work to diminish the value and beauty of Minnesota's singular contribution to the National Park System.

R.R.B

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 99-1191MNST

| | | |
|---|---|---|
| United States of America, Appellee, | * | Order Denying Petition for Rehearing and for Rehearing En Banc |
| vs. | * | |
| Carl E. Brown, Appellant. | * | |

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

September 10, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

U.S. Constitution: Article IV – Admission of New States; Property Clause

Section 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

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U.S. Constitution: Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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16 U.S.C. § 160a. **Establishment; notice in Federal Register; donation of lands; acquisition by purchase of other lands**

In furtherance of the purpose of this subchapter, the Secretary of the Interior (hereinafter referred to as the "Secretary") is authorized to establish the Voyageurs National Park (hereinafter referred to as the "park") in the State of Minnesota, by publication of notice to that effect in the Federal Register at such time as the Secretary deems sufficient interests in lands or waters have been acquired for administration in accordance with the purposes of this subchapter: Provided, That the Secretary shall not establish the park until the lands owned by the State of Minnesota and any of its political subdivisions within the boundaries shall have been donated to the Secretary for the purposes of the park: Provided further, That the Secretary shall not acquire other lands by purchase for the park prior to such donation unless he finds that acquisition is necessary to prevent irreparable changes in their uses or character of such a nature as to make them unsuitable for park purposes and notifies the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives of such findings at least thirty days prior to such acquisition.

40 U.S.C. § 255. Approval of title prior to Federal land purchases; payment of title expenses; application to Tennessee Valley Authority; Federal jurisdiction over acquisitions

Unless the Attorney General gives prior written approval of the sufficiency of the title to land for the purpose for which the property is being acquired by the United States, public money may not be expended for the purchase of the land or any interest therein.

The Attorney General may delegate his responsibility under this section to other departments and agencies, subject to his general supervision and in accordance with regulations promulgated by him.

Any Federal department or agency which has been delegated the responsibility to approve land titles under this section may request the Attorney General to render his opinion as to the validity of the title to any real property or interest therein, or may request the advice or assistance of the Attorney General in connection with determinations as to the sufficiency of titles.

Except where otherwise authorized by law or provided by contract, the expenses of procuring certificates of title or other evidences of title as the Attorney General may require may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department or agency.

The foregoing provisions of this section shall not be construed to affect in any manner any existing provisions of law which are applicable to the acquisition of lands or interests in land by the Tennessee Valley Authority.

Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

36 C.F.R. § 5.3

TITLE 36 – PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER I – NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR

PART 5 – COMMERCIAL AND PRIVATE OPERATIONS – Table of contents

Sec. 5.3 Business operations.

Engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area, is prohibited.

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Minnesota Statutes

**CHAPTER 84B**

**VOYAGEURS NATIONAL PARK**

* * *

**84B.03 Donation of state lands.**

Subdivision 1. **Governor's duties.** Notwithstanding the provisions of any other law to the contrary, the governor, after consulting with the commissioner of natural resources and, in regard to lands forfeited to the state for nonpayment of taxes and held in trust by the state for taxing districts, the commissioner of revenue, shall donate and convey to the United States of America the state's interest in all of the following lands lying within the boundaries of Voyageurs National Park, as described

by section 102 of the act of Congress authorizing the establishment of the park: (1) trust fund lands; (2) lands forfeited to the state for nonpayment of taxes and held in trust by the state for taxing districts; and (3) other lands acquired or otherwise owned by the state. Each conveyance of these lands shall contain the following: (1) a provision that the lands shall revert to the state of Minnesota if (a) the secretary of the interior does not establish the park within five years after donation of all state-owned lands, or if (b) the lands so conveyed are no longer used for national park purposes; (2) a reservation to the state of all minerals and water power rights; (3) a provision that the conveyance is subject to the rights of any person having an interest in the land on the date of conveyance pursuant to state lease, license, or permit; and (4) to satisfy the provisions of section 301(c) of the act authorizing the establishment of Voyageurs National Park, each conveyance of these lands also shall contain the covenant required by that section to prohibit mining or water power development.

Subd. 2. **Trust fund land; condemnation.** For the purpose of satisfying the public sale requirements of Minnesota Constitution, article XI, section 8, and other applicable provisions of Minnesota's Constitution, and in keeping with the decision of the Minnesota supreme court in the case of Independent School District of Virginia v. State, 124 Minn. 271, where the court held that condemnation satisfied the public sale requirement of the Minnesota Constitution, the commissioner of administration shall acquire, by condemnation, fee title to all trust fund lands lying within the boundaries of Voyageurs National Park. The commissioner of administration shall

not condemn the interests of any person holding a lease, license, or permit from the state in the lands condemned. Before any parcel of trust fund land is donated to the United States, the commissioner of administration shall certify to the governor that the parcel has been condemned, the condemnation award has been paid, and the time to appeal from the award has expired.

Subd. 3. **Tax-forfeited land; reimbursement of local taxing districts.** The commissioner of administration shall also acquire fee title, free from any trust or other encumbrance, to all land lying within the boundaries of Voyageurs National Park, the title to which has vested or may vest in the state due to nonpayment of taxes and expiration of the period for redemption, after the giving of notice thereof as provided by law, and is held by the state pursuant to section 281.25, in trust for the respective taxing districts interested in the taxes, assessments, penalties, interest, and costs accrued against the land at the time of expiration of the period of redemption. The commissioner of administration, in cooperation with the commissioner of natural resources, shall appraise the land at its fair market value. Upon determining the value of the land, the commissioner of administration shall transfer to the appropriate county auditor, from money appropriated for this purpose, an amount of money equal to the appraised value of the land, whereupon fee title to the land, free from any trust or other encumbrance, shall vest in the state of Minnesota. When a county is not satisfied with the valuation determined by the commissioner of administration, it may appeal the matter to the district court in Ramsey county. The appeal shall be conducted so far as possible in the manner provided for eminent

domain proceedings by chapter 117. The county auditor shall apportion the money in the manner provided in section 282.08, for the apportionment of proceeds from the sale of tax-forfeited lands.

Subd. 4. **Conveyance.** In furtherance of boundary adjustments to Voyageurs National Park authorized by Congress in Public Law Number 97-405, and notwithstanding any other law to the contrary, the governor, after consulting the commissioner of natural resources, shall donate and convey to the United States of America, for Voyageurs National Park, the state's interest in the following described lands:

(1) Lot 7, Section 4, Township 68 North, Range 18 West;

(2) the area of land commonly referred to as the Kabetogama Forestry Station, consisting of approximately 18.45 acres, and located in Section 21, Township 69 North, Range 21 West; and

(3) land not exceeding 120 acres consisting of a strip of land through that portion of Section 1, Township 68 North, Range 20 West, which is roughly parallel to and 400 feet on each side of the unimproved road extending northward from a point of beginning at the Ash River Trail in the Southeast Quarter of the Southeast Quarter of Section 1 to a point of termination in the Northeast Quarter of the Northwest Quarter in Section 1.

Lands described in clause (1) shall be donated and conveyed only after $30,000 has been paid by the commissioner of natural resources to the city of Tower in return for a conveyance to the state of all right, title, and

interest of the city of Tower in the land. Lands described in clauses (2) and (3) shall be donated and conveyed only after the lands have been condemned by the commissioner of natural resources in the manner required by subdivision 2, and the time to appeal from the condemnation award has expired. All conveyances required by this subdivision shall comply with subdivision 1, except for the provision required by clause (1)(a) of that subdivision.

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**84B.06 State's consent to acquisition of lands.**

Consent of the state of Minnesota is given to the acquisition by the United States in any manner authorized by act of Congress of lands lying within the boundaries of Voyageurs National Park for any purpose incident to the development and maintenance of the park, subject to concurrent jurisdiction of the state and the United States as defined in section 1.041.

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**84B.061 State jurisdiction over Rainy Lake and other navigable waters; duties of governor, attorney general, and other public officers.**

As required by this chapter and the act of Congress authorizing Voyageurs National Park, the state of Minnesota donated in excess of 35,000 acres of state and other publicly owned land for the park, roughly one-fourth of the land area of the park, at a cost of over $5,000,000 to the state. More than 24,000 acres of this land was state

trust fund land which the state condemned before making its donation. Pursuant to section 84B.06, lands donated by the state, along with other lands acquired by the National Park Service for the park, were made subject to concurrent jurisdiction by the state and the United States under section 1.041. In making these donations, none of the navigable waters within the park and the lands under them have been donated to the United States. These navigable waters include the following: Rainy, Kabetogama, Namakan, Sand Point, and Crane lakes. Pursuant to applicable federal and state law, navigable waters and their beds are owned by the state. Ownership of and jurisdiction over these waters and their beds has not been ceded by the state, either expressly or implicitly, to the United. States. Unlike section 1.044 relating to the Upper Mississippi Wildlife and Fish Refuge, where the state expressly granted its consent and jurisdiction to the United States to acquire interests in water, as well as land, the consent granted by the state in section 84B.06 to acquisitions by the United States for Voyageurs National Park is limited to land, only. In the discharge of their official duties, the governor, attorney general, other constitutional officers, and other public officials, such as the commissioner of natural resources, shall vigorously assert and defend, in all forums, the state's ownership of and jurisdiction over these waters and their beds and related natural resources, together with associated rights of the state and its citizens arising from the state's ownership and jurisdiction. In discharging their duties, the governor, attorney general, other constitutional officers, and other public officials shall, additionally, be especially cognizant of the free rights of travel afforded to citizens of

Minnesota and others under the Webster-Ashburton Treaty (proclaimed November 10, 1842) and the Root-Bryce Treaty (proclaimed May 13, 1910) on international and associated boundary waters. Also, in furtherance of duties under this section, the commissioner of natural resources shall continue in effect the commercial removal of rough fish, as defined in section 97A.015, subdivision 43, from these waters, together with any rights to do so possessed by any person on January 1, 1995, so long as the commissioner determines that such taking is desirable to the management of the native fishery.

---

Minnesota Statutes

**CHAPTER 1**

**SOVEREIGNTY, JURISDICTION**

* * *

**1.046 Evidence of consent.**

The consent of the state given under sections 1.041 to 1.048 to the acquisition by the United States of any land or right or interest in land in this state or to the exercise of jurisdiction over any place in this state shall be evidenced by the certificate of the governor, issued in duplicate, under the great seal of the state, upon application by an authorized officer of the United States and upon proof that title to the property has vested in the United States. The certificate shall set forth

(a) a description of the property,

(b) the authority for, purpose of, and method used in acquiring it, and

(c) the conditions of the jurisdiction of the state and the United States over it

and shall declare the consent of the state under sections 1.041 to 1.048, as the case may require. When necessary for proper identification of the property a map may be attached to the certificate, and the applicant may be required to furnish it. One duplicate of the certificate shall be filed with the secretary of state. The other shall be delivered to the applicant, who shall record it in the office of the county recorder of each county in which the land or any part of it is situated.

## DEED

WHEREAS, the Congress of the United States has authorized the establishment of Voyageurs National Park in the State of Minnesota (Public Law 91-661); and

WHEREAS, the State of Minnesota has concurred with the stated purpose of Congress in authorizing the establishment of the park and has directed the donation and conveyance of State lands to the United States of America for Voyageurs National Park (Laws of Minnesota 1971, Chapter 852); and

WHEREAS, the State of Minnesota has entered into the written agreement with the Secretary of the Interior required by Laws of Minnesota 1971, Chapter 852, Section 10, relating to air, land, and water quality standards; and

WHEREAS, the Commissioner of Administration, in cooperation with the Commissioner of Natural Resources, has appraised the lands hereinafter described at their fair market value, and has transferred to the County Auditor of Koochiching County an amount of money equal to such appraised value, in accordance with Laws of Minnesota 1971, Chapter 852, Section 3, Subdivision 3; and

WHEREAS, the Governor of the State of Minnesota has consulted with the Commissioner of Natural Resources and the Commissioner of Revenue (formerly the Commissioner of Taxation) as required by Laws of Minnesota 1971, Chapter 852, Section 3;

NOW, THEREFORE, this Indenture is made this 27th day of August, 1974, between the State of Minnesota,

acting through its Governor, pursuant to Laws of Minnesota 1971, Chapter 852, party of the first part, and the United States of America, party of the second part,

WITNESSETH, subject to the limitations set forth below, the party of the first part does hereby donate and convey unto the party of the second part, for the purposes of Voyageurs National Park, all of its interests except all minerals and water power rights, in lands lying and being in the County of Koochiching, State of Minnesota, described as follows, to-wit:

Government Description

| Lot No. | Tract | Section | Township | Range |
|---|---|---|---|---|
| | E 1/2 SW 1/4 & SW 1/4 SE 1/4 | 10 | 69 | 22 |
| 4 | | 11 | 69 | 22 |
| | SE 1/4 NE 1/4, S 1/2 SW 1/4 & E 1/2 SE 1/4 | 11 | 69 | 22 |
| | SW 1/4 SW 1/4 | 12 | 69 | 22 |
| 1, 2, 3 & 4 | | 1 | 70 | 22 |
| | SW 1/4 NW 1/4, N 1/2 SW 1/4, W 1/2 SE 1/4 & SE 1/4 SE 1/4 | 1 | 70 | 22 |
| 1, 2, 3 & 4 | | 2 | 70 | 22 |

| | | | | |
|---|---|---|---|---|
| | S 1/2 NE 1/4, S 1/2 NW 1/4, W 1/2 SW 1/4 & NE 1/4 SE 1/4 | 2 | 70 | 22 |
| | SE 1/4 NE 1/4 & SE 1/4 | 3 | 70 | 22 |
| | N 1/2 NE 1/4 | 12 | 70 | 22 |
| 6 & 7 | | 13 | 70 | 22 |
| 1 | | 24 | 70 | 22 |
| | NW 1/4 NE 1/4 | 24 | 70 | 22 |
| N 1/2 of 1 | | 26 | 71 | 22 |
| Part of Government Lot 1 described as: All of Blocks 13, 14, 15, 16, 17, 18, 19 and 20, Plat of Gold Harbor, | | 34 | 71 | 22 |
| | SE 1/4 SE 1/4 | 34 | 71 | 22 |
| | SW 1/4 NE 1/4, SE 1/4 NW 1/4, SW 1/4, W 1/2 SE 1/4 & SE 1/4 SE 1/4 | 35 | 71 | 22 |
| An undivided seven-twelfths (7/12) interest in Government Lot 2 | | 35 | 71 | 22 |

All minerals and all water power rights are reserved to the State of Minnesota. The State of Minnesota hereby

covenants that the State, its licensees, permittees, lessees, assigns, or successors in interest, shall not engage in or permit any mining activity or water power development within the boundaries of Voyageurs National Park.

The lands so donated and conveyed are subject to the rights of any person having an interest in the land on the day and year first above written pursuant to an existing State lease, license, or permit.

The lands so donated and conveyed shall revert to the State of Minnesota if (a) the Secretary of the Department of the Interior for the United States of America does not establish Voyageurs National Park within five years after donation of all state-owned lands, or if (b) the lands so donated and conveyed by the State are no longer used for national park purposes.

TO HAVE AND TO HOLD THE SAME, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the party of the second part, forever, subject to the above limitations.

IN TESTIMONY WHEREOF, the party of the first part, acting through its Governor, has hereunto set its hand and affixed its great seal on the day and year first above written.

/s/ Wendell R. Anderson
WENDELL R. ANDERSON
GOVERNOR OF THE STATE
OF MINNESOTA

In presence of:

/s/ Robert L. Herbst
Robert L. Herbst
Commissioner of
Natural Resources

/s/ Arthur C. Roemer
Arthur C. Roemer
Commissioner of
Revenue

/s/ Richard L. Brubacher
Richard L. Brubacher
Commissioner of
Administration

STATE OF MINNESOTA
County of Koochiching
(4 pgs)

I hereby certify that I have compared the within instrument with the original instrument No. 147462 now recorded in my office, and that it is a true and correct copy of the same and of the whole thereof and that the above is a true-copy of the recording thereon.

Dated Dec. 8, 1997

/s/ Pamela A. Taju

COUNTY RECORDER
Koochiching County, Minn. 56649

STATE OF MINNESOTA )
) SS
COUNTY OF RAMSEY )

On this 27th day of August, 1974, before me, Arlen I. Erdahl, the Secretary of State for the State of Minnesota, personally appeared Wendell R. Anderson, Governor of the State of Minnesota, who executed the foregoing

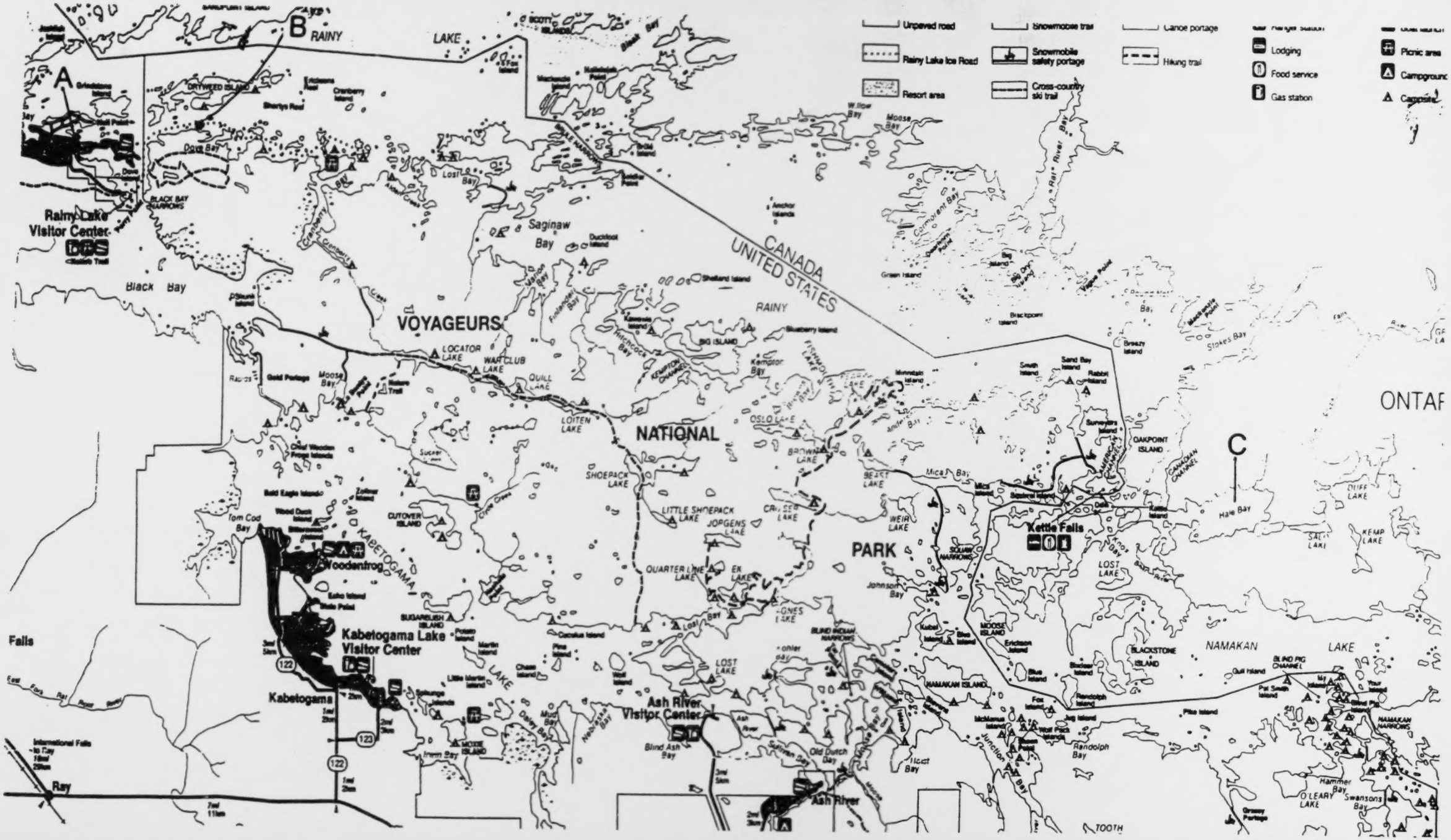
instrument pursuant to the Laws of Minnesota 1971, Chapter 852.

/s/ Arlen I. Erdahl
SECRETARY OF STATE
STATE OF MINNESOTA

SEAL

This deed is exempt from state deed tax pursuant to Minnesota Statutes 1971, Section 287.22.

This deed was drafted by the Attorney General's office, State of Minnesota.


Unpaved road
Rainy Lake Ice Road
Resort area
Snowmobile trail
Snowmobile safety portage
Cross-country ski trail
Canoe portage
Hiking trail
Lodging
Food service
Gas station
Picnic area
Campground
Campsite
A
B
C
RAINY LAKE
Rainy Lake Visitor Center
Black Bay
Saginaw Bay
CANADA
UNITED STATES
RAINY
VOYAGEURS
NATIONAL
PARK
Kettle Falls
NAMAKAN LAKE
Kabetogama Lake Visitor Center
Kabetogama
Woodenfrog
Ash River Visitor Center
Ash River
Ray
Falls
ONTAR

Supreme Court, U.S.
FILED
FEB 09 2000
CLERK

(2)

No. 99-989

In The

# Supreme Court of the United States

HAROLD M. ARMSTRONG,

and

CARL E. BROWN,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## AMICUS BRIEF OF THE STATES OF MINNESOTA, MICHIGAN, AND MONTANA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Petitioners challenge National Park Service jurisdiction over navigable waters owned by the State of Minnesota within the boundaries of Voyageurs National Park. Minnesota maintains that state jurisdiction over the waters has never been ceded to the federal government for national park purposes.[1] The question presented is:

---

[1] The State's position is unequivocably stated in Minn. Stat. § 84B.061 which provides as follows:

> **84B.061 STATE JURISDICTION OVER RAINY LAKE AND OTHER NAVIGABLE WATERS; DUTIES OF GOVERNOR, ATTORNEY GENERAL, AND OTHER PUBLIC OFFICERS.**
>
> As required by this chapter and the act of Congress authorizing Voyageurs National Park, the state of Minnesota donated in excess of 35,000 acres of state and other publicly owned land for the park, roughly one-fourth of the land area of the park, at a cost of over $5,000,000 to the state. More than 24,000 acres of this land was state trust fund land which the state condemned before making its donation. Pursuant to section 84B.06, lands donated by the state, along with other lands acquired by the National Park Service for the park, were made subject to concurrent jurisdiction by the state and the United States under section 1.041. In making these donations, none of the navigable waters within the park and the lands under them have been donated to the United States. These navigable waters include the following: Rainy, Kabetogama, Namakan, Sand Point and Crane lakes. Pursuant to applicable federal and state law, navigable waters and their beds are owned by the state. Ownership of and jurisdiction over these

## QUESTION PRESENTED – Continued

Whether, in the absence of state donation of property interests in navigable waters or express state cession of jurisdiction over those waters, a state may be stripped of its sovereign jurisdiction over state-owned navigable waters, by judicial implication, when those waters have been included within the exterior boundaries of a national park.

---

waters and their beds has not been ceded by the state, either expressly or implicitly, to the United States. *Unlike section 1.044 relating to the Upper Mississippi Wildlife and Fish Refuge, where the state expressly granted its consent and jurisdiction to the United States to acquire interests in water, as well as land, the consent granted by the state in section 84B.06 to acquisitions by the United States for Voyageurs National Park is limited to land only.* In the discharge of their official duties, the governor, attorney general, other constitutional officers, and other public officials, such as the commissioner of natural resources, shall vigorously assert and defend, in all forums, the state's ownership of and jurisdiction over these waters and their beds and related natural resources, together with associated rights of the state and its citizens arising from the state's ownership and jurisdiction. In discharging their duties, the governor, attorney general, other constitutional officers, and other public officials shall, additionally, be especially cognizant of the free rights of travel afforded to citizens of Minnesota and by others under the Webster-Ashburton Treaty (proclaimed November 10, 1842) and the Root-Bryce Treaty (proclaimed May 13, 1910) on international and associated boundary waters. . . . (emphasis added). (Enacted as Minn. Laws 1995, Chapter 124, Sec. 2.)

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## INTEREST OF AMICI

The State of Minnesota supports the Petition for Writ of Certiorari. This case involves issues of sovereignty that are of fundamental concern to the State. The lower court rulings are based on a judicially created doctrine of "tantamount cession" that provides for cession, by judicial implication, of a state's jurisdiction over state-owned navigable waters. This doctrine was applied to the present facts where the State of Minnesota donated over 34,000 acres of state-owned land, at a cost to the State in excess of $5 million, to the federal government to establish a national park. The State, however, did not donate state-owned navigable waters adjacent to the donated land and did not expressly cede any jurisdiction over those waters to the federal government. The ruling of the lower court conflicts with established precedent of this Court and seriously erodes a fundamental aspect of state sovereignty. In the absence of express state cession of jurisdiction and federal acceptance of jurisdiction, the lower court ruling provides the National Park Service with a basis for regulatory jurisdiction through erroneous interpretation of the United States Constitution's Property Clause. The State's ability to maintain its jurisdiction and its regulatory control over vital state resources associated with these navigable waters has been wrongfully taken away.

## STATEMENT OF FACTS

### A. The Establishment of Voyageurs National Park.

The concept of Voyageurs National Park dates back to 1891 when the Minnesota Legislature requested that the President of the United States establish a national park in the area of Minnesota between Crane Lake on the east and Lake of the Woods on the West. (Minn. General Laws 1891, Resolution 13). Progress was slow. The request was considered, but no meaningful action was taken until 1960 when the State asked the National Park Service to study the possibility of establishing a park within the area initially considered. The Department of Interior made a recommendation for creation of a park in 1964. A bill authorizing the establishment of such a park was introduced in Congress in 1968 by Minnesota Congressman John Blatnik. The bill was introduced too late for consideration in that session of Congress and Congressman Blatnik re-introduced a revised version of the bill in 1969.[2]

---

[2] The bill introduced by Representative Blatnik in 1969 (H. R. No. 10482) authorized continuance of resorts in the proposed national park area; seaplane, motorboat, houseboat, and snowmobile use; limited timber harvesting; and public hunting. Limited timber harvesting and public hunting were amended out of the bill before passage. The bill, as introduced, reflected concerns arising from the United States Forest Service Administration of the Boundary Waters Canoe Area or "B.W.C.A." (located directly East of the proposed Voyageurs National Park), where resorts and airplanes were banned, motorboats restricted, and where existing restrictions on logging and snowmobiling were being further tightened. Blatnik's Eighth Minnesota Congressional District included all of the BWCA and most, if not all, of proposed Voyageurs

Finally, on January 8, 1971, Voyageurs National Park (hereinafter referred to as "VNP" or the "Park") was authorized by an Act of Congress (Public Law 91-661). The Act required the State to donate state land and other publicly-owned land for the Park. The Act did not require the donation of any interests in state-owned waters or their beds.

In June 1971, the Minnesota legislature passed an act authorizing land transfers to the United States for creation of the Park at a cost in excess of $5 million to the State. The transfer of 35,235 acres of state land was completed in 1975, fulfilling the requirements of Public Law 91-661. The National Park Service accepted transfer of these lands and the Secretary of Interior officially established VNP on April 8, 1975.[3]

---

National Park. His 1969 Voyageurs National Park Bill did not amount to a westerly extension of the Boundary Waters Canoe Area for obvious reasons.

[3] The Secretary of Interior's "Notice of Establishment of Voyageurs National Park, Minnesota was published on April 8, 1975 in the Federal Register (Vol. 40, No. 68, at 15921-22). It refers only to land, as follows:

> Whereas more than 34,000 acres of land, including all the land required to be donated by the State of Minnesota, are now under the ownership of the United States and under the administrative jurisdiction of the National Park Service within the boundaries of Voyageurs National Park, as the boundaries are set forth in section 102 of the Act of January 8, 1971 (84 Stat. 1971), and the acreage so required, in my opinion, is efficiently administratable to carry out the purposes of such Act.
>
> Now, therefore, I, Rogers C. Morton, Secretary of the Interior, hereby give notice of the establishment of

Within the Park boundaries there are approximately 139,000 acres of land, one-quarter of which was donated by the State of Minnesota, and 80,000 acres of navigable water, all of which is owned by the State and none of which was donated for the Park. The State of Minnesota donated the land necessary to bring VNP to reality and supported the establishment of the Park. However, the State of Minnesota never intended, nor did it effectuate, the transfer of any navigable waters to the federal government in connection with the establishment of VNP.

**B. The Present Dispute.**

The present case involves a challenge by Carl E. Brown and Harold "Bo" Armstrong to the National Park Service's ("NPS") jurisdiction over waters within VNP owned by the State of Minnesota. On August 10, 1996, Petitioners were stopped by NPS representatives while operating a boat with paying passengers aboard and traveling through Minnesota waters that are included within the exterior boundaries of the Park. Petitioners were cited for violating 36 C.F.R. § 5.3, which provides:

> Engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be

---

Voyageurs National Park, such establishment to become effective on April 8, 1975.

The notice then continues with legal descriptions of the lands involved, including islands, but not the waters surrounding the islands.

> specifically authorized under special regulations applicable to a park area, is prohibited.

Petitioners were found guilty of violating the above regulation by a U. S. Magistrate Judge. That ruling was affirmed by the district court on January 5, 1999. Petitioners sought review before the Eighth Circuit Court of Appeals. The district court's ruling was affirmed on July 28, 1999. *See United States of America v. Harold M. Armstrong and Carl E. Brown,* 186 F.3rd 1055 (8th Cir. 1999). Petition for Rehearing was denied on September 10, 1999.

Minnesota's retention of its sovereign interests in the navigable waters of VNP precludes any assertion of jurisdiction by the federal government over those waters. Those same sovereign interests of the State preserve the rights of citizens to travel on and make use of the surface waters consistent with the laws of the State. Petitioners in this case were not violating State law and, to the contrary, had considerable expectation that the sovereign state interests they were relying on provided a legal basis for boating across State waters.

## REASONS FOR GRANTING THE WRIT

### I. Important Issues Of State Sovereignty Regarding Jurisdiction Over Navigable Waters Are Raised In This Case.

#### A. Jurisdiction Over Navigable Waters Is A Fundamental Aspect Of State Sovereignty.

This Court from an early date has acknowledged that, at the time of independence, the people of each of the Thirteen Colonies "became themselves sovereign, and

in that character hold the absolute right to all their navigable waters and the soils under them for their own common use . . . " *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842). In *Lessee of Pollard v. Hagan*, 3 How. 212 (1845), this Court concluded that states entering the Union after 1789 did so on an "equal footing" with the original states and so have similar ownership over these "sovereign lands." *Id.*, at 228-229. This Court has also held that in consequence of this rule, a State's title to these sovereign lands arises from the equal footing doctrine and is "conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

The rulings of this Court evidence the importance of state sovereignty over navigable waters. Accordingly, any threat to the State of Minnesota's jurisdiction over the waters at issue here strikes at the very heart of the rights and authorities guaranteed to the State when it came into the Union.

### B. Title To The Land And Navigable Water Vested In The State At Statehood.

The State of Minnesota was admitted into the Union in 1858. As noted above, upon its admission to the Union, the State took ownership and possession of the lands and waters within its territory on equal footing with other states of the Union. *See United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). Therefore, title to the waters and the beds of navigable waters, unless previously reserved or otherwise disposed of by the federal government,

passed to the State upon its admission to the Union.[4] Minnesota reiterated these fundamental principles by the enactment in 1995 of Minnesota Statutes, Sections 1.0451 and 84B.061, *supra,* wherein the legislature directed state officials to protect state sovereign interests associated with these waters. The principle that underlies the equal footing doctrine and state ownership is that navigable waters uniquely involve sovereign interests rooted in English common law tracing back to the Magna Carta. *See Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 283 (1997). The State's ownership of navigable waters within the exterior boundaries of Voyageurs National Park was affirmed by the lower court in *United States v. Brown,* 552 F.2d 817, 820 n. 3 (8th Cir. 1977) (*Brown I*).

None of the parties in this case, including the federal government, dispute Minnesota's ownership of the navigable water and the beds beneath them in what is now VNP. What is disputed is whether Minnesota has ceded its jurisdiction over waters to the federal government when the Park was established. The opinion below affirmed the Eighth Circuit's holding in *Brown I, supra,* that Minnesota's participation in the establishment of Voyageurs National Park was "tantamount to a cession of jurisdiction over the lands and waters within the park boundaries." *Id.* 552 F.2d at 821. The holding by the lower court is directly contrary to this Court's precedent recognizing that ownership of navigable waters is a vital aspect of state sovereignty. Such a fundamental aspect of

---

[4] The navigable waters at issue here were not previously reserved or otherwise disposed of by the federal government prior to Minnesota's admission into the Union.

state sovereignty should not be permitted to be eliminated on the basis of mere implication.

### C. Absent State Donation Of Its Interests In Waters Within The Exterior Boundaries Of Voyageurs National Park, Exercise Of Jurisdiction Over These Waters By The National Park Service Has No Foundation In The Property Clause Of The United States Constitution.

The Property Clause of the United States Constitution empowers the United States to enact regulatory legislation protecting federal lands from interference. It provides that "Congress shall have the power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States." U. S. Const. Art. IV, § 3, cl. 2. As stated earlier, the State's ownership of the navigable waters and their beds located within the boundaries of VNP is not disputed by any of the parties. As a consequence, the lower court's holding that the National Park Service's jurisdiction over these waters could be based on the Property Clause is without constitutional foundation and is contrary to the following decisions of this Court.

In *Colorado v. Toll*, 268 U.S. 228 (1925), the National Park Service attempted to regulate the use of automobiles that carried paying passengers on Colorado state highways. Colorado argued that jurisdiction over state and county highways passing through Rocky Mountain National Park had not been ceded to the federal government. In reviewing the Act establishing Rocky Mountain National Park, this Court in *Toll* ruled that:

> There is no attempt to give exclusive jurisdiction to the United States, but on the contrary the rights of State over the roads are left unaffected in terms. Apart from those terms the state denies the power of Congress to curtail its jurisdiction or rights without an act of cession from it and an acceptance by the national government.

*Id.*, 268 U.S. at 231.

In the present case, Congress did not require a donation of state-owned water or sovereignty in connection with the establishment of the Park, nor did it provide for an exclusive grant of jurisdiction for the National Park Service to regulate navigable waters. This is particularly significant when considering that Congress *did* require such donation or sovereignty, with the cooperation of the states involved, in connection with the establishment of other national parks such as Isle Royale National Park, 16 U.S.C. § 408(g), and Everglades National Park 16 U.S.C. §§ 410(u) and 410(r-l).

Not only was a donation of state-owned navigable waters or a grant of jurisdiction to the federal government conspicuously absent from the Act establishing VNP, the State never ceded jurisdiction and the federal government never accepted jurisdiction over the waters. In this regard, pursuant to 40 U.S.C. § 255, the federal government is required to formally acknowledge that consent has been given by a state to relinquish jurisdiction and that the United States has agreed to accept jurisdiction.

Section 255 specifically provides that a notice of acceptance is to be filed with the Governor of the State

where the lands are located and that unless or until the United States accepts jurisdiction, it shall be conclusively presumed that no jurisdiction has been accepted. *See Adams v. United States*, 319 U.S. 312 (1943). In *Adams*, recognition of federal jurisdiction over a crime committed within Camp Clairborne, Louisiana was denied. This Court upheld the requirements of 40 U.S.C. § 255 and ruled that "since the government had not accepted jurisdiction in the manner required by the Act, the federal court had no jurisdiction of the proceedings." *Id.*, 319 U.S. at 315.

Similar to *Adams*, none of the requirements of § 255 have been met regarding the National Park Service's claimed jurisdiction over the navigable waters in VNP. Without clear cession by the State and acceptance by the United States, the State retains its jurisdiction. The waterways in VNP are equivalent to the roadways in *Toll*. Moreover, given the ruling in *Toll*, there is no basis for the judicially-created doctrine of "implied" or "tantamount cession" to support National Park Service jurisdiction to regulate Minnesota waters.

Before *Toll*, in *Kansas v. Colorado*, 206 U.S. 46 (1907), the federal government made virtually the same Property Clause argument that is being made by the government in this case. At issue in *Kansas* was the jurisdiction over state-owned waters adjacent to federally-owned lands. This Court rejected the federal government's argument that the Property Clause power extended federal authority beyond federal land to include waters owned by the state. In *Kansas*, this Court held that the power of the United States to regulate property within a state is limited to the property actually owned by the United States.

*Id.*, 206 U.S. at 89. The *Toll* and *Kansas* decisions are in direct conflict with the lower court's ruling in this case. To resolve this conflict, the Petition for Certiorari must be granted.

The Eighth Circuit Court cited *Kleppe v. New Mexico*, 426 U.S. 529 (1976), as relied upon in *Brown I*,[5] in support of its ruling. *Kleppe* involved a narrow question of whether the power to regulate provided by the Property Clause extended to protection of wildlife on federally-owned land. No state land or water was involved in *Kleppe*. Accordingly, the decision there cannot be construed to support the lower court's ruling that National Park Service jurisdiction extends beyond federal land to include state-owned lands and waters. The ruling in *Kleppe* did not expand the government's Property Clause power. To do so, this Court must limit or overrule its decisions in *Toll* and *Kansas*.

The court below also relied on its ruling in *Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981) to support its holding. *Block*, however, arose under entirely different circumstances. In *Block*, federal regulations regarding motorized

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[5] The holding in *Brown I*, did not contemplate the facts of the current case. In *Brown I*, both the district court and the court of appeals based their rulings in part on the direct impact that waterfowl hunting as an activity would have on immediately adjacent federally-owned lands. Accordingly, because waterfowl hunting on state waters could have an impact on adjacent federally-owned lands, the courts concluded that the National Park Service may regulate such activity. The current case does not involve shotgun pellets falling on federally-owned lands, as did *Brown I*.

boats were upheld because the court determined that Congress specifically authorized those regulations.

State jurisdiction over the waters within VNP, on the other hand, was recognized by the federal government when it established the Park in 1975 based upon Minnesota's donation of land, alone, for the Park.[6] State jurisdiction is consistent with Supreme Court precedent as well. As discussed above, the Supreme Court's holdings in *Kansas* and *Toll* have not been limited or overturned.

The Property Clause of the Constitution does not extend to state-owned navigable waters simply because they are adjacent to federal lands. Viewed charitably, the federal takeover of state-owned waters may be explained as a neat, tidy, and efficient way for a federal agency to discharge its perceived duties, without the complications of involving the owner of the property being regulated. However, this Court has made it abundantly clear that it does not share that view. In *New York v. United States*, 505 U.S. 144 (1992), this Court stated:

> The question is not what power the federal government ought to have but what powers in fact have been given by the people. *United States v. Butler*, 297 U.S. 1, 63 (1936).

505 U.S. at 157.

The lower court ruling conflicts with well-established constitutional principles and precedent set by this Court.

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[6] This was also recognized by the district court in *United States v. Brown*, 431 F. Supp. 56, 59 (D. Minn. 1976) where it held that the State had not ceded jurisdiction over the waters when the Park was established.

Accordingly, the Court should reverse the lower court's decision and restore Minnesota's constitutionally guaranteed sovereign rights.

### D. The State Has Not Ceded Jurisdiction Over Waters In The Park.

Within its boundaries, the State holds the navigable waters and lands beneath them in trust for the benefit of the citizens of Minnesota. The State has consistently maintained that ownership of navigable waters and their beds and the jurisdiction over them is an important aspect of state sovereignty. In regard to these waters and their beds located within the exterior boundaries of VNP, Minnesota simply has not ceded jurisdiction and has consistently asserted its sovereign rights as discussed below.

First, as important as it was to establish a national park within Minnesota, the State was only willing to donate and cede jurisdiction over land to the federal government in connection with the establishment of VNP. (Minn. Stat. § 84B.06). The State's intent is clearly demonstrated in the title and body of the State Act (Laws of 1971 Chapter 852)[7] authorizing donation of the state-owned

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[7] Title to Minn. Laws 1971, ch. 852, reads as follows:

"An act relating to Voyageurs National Park; authorizing the donation of state lands to the United States for the park; authorizing condemnation of state trust fund lands and lands of political subdivisions located within the park boundaries; authorizing acquisition of unencumbered title to lands held in trust for taxing districts; authorizing the filing of

lands. Significantly, the word "water" does not appear in the title of the Act. Further, there is no mention of donation of state-owned navigable waters, no consent to federal acquisition of these waters, and no cession of state jurisdiction over these waters in the title or body of this law. (Petitioner Brown's Appendix at pp. 59-63). As stated by Robert Herbst, Minnesota's Commissioner of Natural Resources in his June 14, 1975, comments in *Response to the National Park Services' Proposed Master Plan and Environmental Impact Statement for the Park:* "While these waters are part of Voyageurs National Park, the water and beds are the sovereign right of the State of Minnesota, and these rights have not been transferred to the Federal Government. Only the land surface rights of the state public lands were transferred." (App. 3).

Second, the State's retention of these rights has been consistently asserted by the State after the establishment of the Park. In 1977 in *Brown I,* and in 1981 in *Alexander v. Block, supra,* the State denied any cession of interests in navigable waters in VNP and the BWCA. Both of these cases involved a different legal context than presented by the facts in this case, but both evidence the State's commitment and consistent effort to protect its jurisdiction over navigable waters in VNP.

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certain claims; consenting to federal land acquisition within the park; specifying powers and duties of public officials in relation thereto; appropriating money and authorizing the issuance and sale of state bonds for the acquisition of the lands within the park."

More recently, the State re-affirmed the retention of its rights and jurisdiction over navigable waters in VNP through the enactment of Minn. Stat. § 84B.061, *supra.* This statute demonstrates that ownership and jurisdiction over state-owned navigable waters and their beds located within Voyageurs National Park has never been ceded by the State either expressly or implicitly. In plain language, the State has eliminated the basis for judicial speculation that the 1971 state law donating state land for establishment of VNP was "tantamount to cession of state owned waters."

### E. The State's Sovereign Interests In Waters Within Voyageurs National Park Are Protected By The Tenth Amendment.

The Tenth Amendment to the Constitution provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.

The central issue before the lower court was whether the federal government through the National Park Service has a basis for regulatory jurisdiction on the waters of Voyageurs National Park. Discerning the proper division of authority between the federal government and one of its states is a question as old as the Constitution itself. *New York, supra,* 505 U.S. at 149. In *New York,* when examining the constitutionality of an Act of Congress regulating low level radioactive waste, this Court

reflected upon the relationship between the federal and state sovereigns and held:

> Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extra constitutional government with each issue of comparable gravity would, in the long run, be far worse.

*Id.* 505 U.S. 187-188.

The opinion below disregards the importance of state sovereign interests, sweeping aside state sovereignty on the basis of judicially created "implied cession" of the State's jurisdiction. The State's sovereignty cannot be set aside by the lower court either by judicial assumption that Minnesota waived its sovereignty as a mere cost of agreeing to have a national park in Minnesota or by judicial inference that state interests have been subordinated to broader federal interests. In focusing on the federal/state relationship this Court in *New York* held:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.

*Id.* If Congress intends to alter the usual constitutional balance between states and the federal government, it must make its intention unmistakably clear. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). The Tenth Amendment protects the sovereign interests retained by the State including its ownership and sovereign jurisdiction over navigable waters within VNP.

This Court's holding in *New York* has been the cornerstone of a wide range of cases where the federal government has impermissibly sought to impose regulatory programs on state governments. *See Printz v. United States*, 521 U.S. 898, 919 (1997). In *Printz*, provisions of the Brady Act commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers were held to be an unconstitutional imposition on state sovereignty.

The principles expounded in *New York* have also been recognized in cases where other important aspects of state sovereignty or sovereign immunity have been examined. *See Alden v. Maine*, ___ U.S. ___, 119 S. Ct. 2240, 2247 (1999) (provision of Federal Labor Standards Act purporting to authorize private actions against states in state

courts found unconstitutional); *College Savings Bank v. Florida Prepaid Post Secondary Ed. Expense Bd.*, ___ U. S.___, 119 S. Ct. 2219 (1999); (Florida's sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State.) Through these decisions, this Court has steadfastly held to the premise that the Constitution established a system of "dual sovereignty" as a basic protection of liberty for the people. *Gregory v. Ashcroft, supra,* 501 U.S. at 457. The Constitution's structural protection of liberty requires that there be "a healthy balance of power between the states and the federal government that will reduce the risk of tyranny and abuse from either front." *Id.*, 501 U.S. at 458.

The opinion below seriously damaged the principles of federalism secured by the Constitution by setting aside a vital aspect of state sovereignty. The recent opinions of this Court demonstrate that state sovereignty cannot be implicitly abrogated or waived. Review must be granted to resolve the fundamental constitutional conflict created by the opinion below.

## CONCLUSION

For the above reasons, the State of Minnesota respectfully requests that the Petition for Certiorari be granted.

Dated: February 2000

Respectfully submitted,

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# COMMENTS ON VOYAGEURS NATIONAL PARK DRAFT MASTER PLAN AND EIS

(DEFENDANTS' TRIAL EXHIBIT "N")

## APPENDIX

## COMMENTS ON VOYAGEURS NATIONAL PARK DRAFT MASTER PLAN AND EIS

By Commissioner Robert L. Herbst
Department of Natural Resources
State of Minnesota

June 14, 1975

The Commissioner and staff of the Department of Natural Resources have reviewed the Draft Master Plan and Draft EIS on Voyageurs National Park and have several comments to offer which we hope will be of assistance in preparation of the final documents.

1. A major deficiency of the plan seems to be that it does not touch on the many issues relating to the surrounding area outside the park. The park will have a major influence on land use outside the park, but at the same time that land use will greatly affect visitor perceptions and attitudes as they approach the park and, ultimately, the park experience itself. Therefore, we believe the park cannot be planned without considering the periphery, including land use and development, accommodations for visitors, transportation and access, etc. Since this is a Park Service project, the Park Service has the responsibility for considering the inter-relationships between the park and the surrounding area. Such coordinated planning would also provide greater flexibility in the planning of the park itself. While we recognize that the National Park Service has no jurisdiction outside the park, the plan should be sensitive to the needs of the state and the area residents.

2. The plan is very broad in many respects. While a master plan admittedly cannot be too detailed, some

concerns are not discussed sufficiently to reveal what overall policy will be. An example is the matter of public accommodations – how much is needed and how will it be provided, etc., especially since there will be only primitive accommodations within the park.

3. The Park Service is to be complimented on its decision to review the plan at five-year intervals. Hopefully, this will provide the flexibility necessary to meet changing conditions. DNR will be happy to be of assistance in these periodic reviews, and we trust this process will also insure continuing public participation.

* * *

Another result of lack of forest disturbance will be a buildup of fuels, leading to the possibility of a catastrophic fire which could substantially destroy both facilities and esthetics. The absence of disturbance could also result in epidemic disease or insect infestations and the killing of large stands of timber. While these occurrences would result from natural processes, they would not really be natural, because in the totally uncontrolled ecosystem, natural fires of more frequent occurrence would have kept the dead and downed trees and other organic matter at levels which generally would not support catastrophic fires or disease or insect outbreaks. In this regard, it should also be noted that the use of pesticides will be limited by the large amount of water areas thereby making a sound vegetative management program of even greater importance.

13. As has been mentioned, the plan is very sketchy as to how visitors will be accommodated. Since there will be very few facilities within the park, consideration should be given in the plan to the accommodation of visitors outside the park. Information such as

the number of visitors, length of stay, travel routes and points of entry, etc., should be given to guide the private sector in the provision of visitor facilities, and the plan should outline how the Park Service will work with the private sector and other governmental agencies in coordinating the provision of facilities.

14. In regard to management of the waters within the park, the plan should clearly indicate that the state has statutory authority to maintain water levels on those lakes not controlled by the International Joint Commission. While these waters are part of Voyageurs National Park, the water and beds are the sovereign right of the State of Minnesota, and these rights have not been transferred to the Federal Government. Only the land surface rights of the state public lands were transferred.

    The Plan should also indicate that any control of surface use of lakes will be accomplished under the state's surface use zoning program, in accordance with DNR's statutory authority. Such regulations may well be necessary on the lakes, and if so, could be initiated by an appropriate request by the Park Service to the state to develop such a program.

(3) (3)

Nos. 99-989 and 99-1000

Supreme Court, U.S.
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# In the Supreme Court of the United States

CARL E. BROWN, PETITIONER

*v.*

UNITED STATES OF AMERICA

HAROLD M. ARMSTRONG, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the National Park Service may regulate commercial tour-boat operations on Rainy Lake within Voyageurs National Park.

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 186 F.3d 1055.[1] The orders and opinions of the district court and magistrate judge (Pet. App. 21a-41a) are not yet reported.

[1] The citations to "Pet. App." refer to the petition appendix in No. 99-989.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 20a) was entered on July 28, 1999. A petition for rehearing was denied on September 10, 1999 (Pet. App. 54a). The petitions for a writ of certiorari were filed on December 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a bench trial before a magistrate judge in the United States District Court for the District of Minnesota, petitioners were convicted of conducting commercial operations on the waters of Voyageurs National Park in violation of 16 U.S.C. 3 and 36 C.F.R. 5.3. Petitioner Brown was sentenced to 60 days' imprisonment and fined $5000, while petitioner Armstrong was sentenced to 30 days' imprisonment and fined $300. See 16 U.S.C. 3; 18 U.S.C. 3559, 3571. Petitioners' terms of imprisonment and a portion of the fines were stayed on condition that they comply with the terms of their unsupervised probation. See Pet. App. 6a-7a, 28a-30a.

1. In 1970, Congress enacted the Voyageurs National Park Act, which authorized the Secretary of the Interior to establish a 219,000-acre national park within the State of Minnesota along the United States-Canada border. 16 U.S.C. 160 *et seq.* Congress took that action to preserve "the outstanding scenery, geological conditions, and waterway system which constituted a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States." 16 U.S.C. 160.

Congress directed the Secretary of the Interior to establish Voyageurs National Park "at such time as the Secretary deems sufficient interests in lands or waters

have been acquired for administration," and it made the establishment contingent on Minnesota's donation of state-owned lands within the park boundaries. 16 U.S.C. 160a. Minnesota, which had long sought national park designation for the area, enacted legislation donating the necessary lands. See Minn. Stat. § 84B.01-10 (1971). The Secretary of the Interior officially established Voyageurs National Park in 1975. See 40 Fed. Reg. 15,921-15,922 (1975).

Congress has authorized the Secretary of the Interior to promulgate regulations governing the use of lands and waters within the National Park System. 16 U.S.C. 1a-2(h), 3. Since at least 1966, the National Park Service has prohibited "[e]ngaging in or soliciting any business in park areas, except in accordance with the provisions of a permit." 36 C.F.R. 5.3. Congress has made the violation of National Park Service regulations, including 36 C.F.R. 5.3, punishable as a criminal offense. See 16 U.S.C. 3.

2. In August 1996, petitioners were apprehended while operating tour boats, without permits, within the boundaries of Voyageurs National Park, in violation of 36 C.F.R. 5.3. Petitioner Brown deliberately engaged in the illegal activity to express his longstanding view that the National Park Service lacks any authority to regulate commercial activity on Rainy Lake within the boundaries of Voyageurs National Park. See Pet. App. 33a-34a. Petitioner Armstrong, a Canadian citizen and acquaintance of Brown, joined in that activity. See *ibid.* Petitioners were convicted of violating 36 C.F.R. 5.3. Brown has twice previously been convicted of wilfully violating National Park Service regulations under similar circumstances. See *United States* v. *Brown*, 552 F.2d 817 (8th Cir.), cert. denied, 431 U.S. 949 (1977) (*Brown I*); *United States* v. *Brown*, Violation Notice

No. P363422 (D. Minn. Mar. 29, 1994) (*Brown II*), *reprinted at* Pet. App. 42a-53a.

3. The court of appeals affirmed petitioners' convictions, rejecting their argument that the United States lacks authority to regulate commercial activity on Rainy Lake within Voyageurs National Park. Pet. App. 1a-19a. The court first reaffirmed its prior ruling in *Brown I* that "Minnesota consented to the [National Park Service's] exercise of jurisdiction over business operations within [Voyageurs National Park], including the operation of tour boats." Pet App. 8a-9a. The court additionally concluded that, in any event, Congress properly exercised its authority under the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, to enact 16 U.S.C. 1a-2(h), which authorizes the National Park Service to "promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System." Pet. App. 12a-13a. Congress's enactment of 16 U.S.C. 1a-2(h) accordingly provided "an 'additional basis for jurisdiction' independent of the jurisdiction Minnesota ceded to the United States." Pet. App. 13a. Finally, the court rejected petitioners' arguments that two international treaties—the Root-Bryce Treaty, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, and the Webster-Ashburton Treaty, Aug. 9, 1842, U.S.-Gr. Brit., 8 Stat. 572—prohibited the United States from regulating tour boats on boundary waters within Voyageurs National Park. The court concluded that those treaties, which preserve "free" navigation on boundary waters, do not prevent the United States or Canada

from enacting non-discriminatory rules and regulations respecting tour boat operators. Pet. App. 16a.[2]

**ARGUMENT**

The court of appeals correctly ruled that the National Park Service may regulate commercial tour-boat operations on lakes within Voyageurs National Park. That ruling does not conflict with any decision of this Court or another court of appeals and does not warrant further review.

1. Petitioners contend that the court of appeals' decision conflicts with decisions of this Court and other courts of appeals "regarding the sovereign rights of states under the Constitution." See 99-989 Pet. 12-19; see also 99-1000 Pet. 17. They essentially contend that the court of appeals erred in ruling that Minnesota consented to the United States' exercise of regulatory jurisdiction within Voyageurs National Park and that express consent is an essential prerequisite before the National Park Service may regulate commercial activities on navigable waters within a national park. See 99-989 Pet. 21-27.

The court of appeals answered petitioners' challenge to the National Park Service's power to regulate commercial activities on navigable waters within Voya-

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[2] The court of appeals also considered petitioner Brown's challenge to his sentence. The court rejected Brown's argument that the sentence was excessive and "cruel and unusual" except insofar as it prohibited Brown, as a condition of probation, from entering Voyageurs National Park to pursue non-business activities. The court of appeals remanded the case to the district court with instructions to modify petitioner Brown's conditions of probation to make clear that Brown could "visit [Voyageurs National Park] to engage in the same recreational and educational activities as other visitors to [the Park]." Pet. App. 19a.

geurs National Park by reaffirming that court's 1977 ruling in *Brown I* that "the state of Minnesota consented to the [National Park Service's] exercise of jurisdiction over business operations within [the Park], including the operation of tour boats." Pet. App. 8a-9a. This Court denied Brown's previous petition for a writ of certiorari in *Brown I* involving the same issue and virtually identical facts. See *Brown* v. *United States*, 431 U.S. 949 (1977). There is no reason for this Court to engage in further review of that fact-bound, case-specific question, the effects of which are limited to one national park contained wholly within the jurisdiction of one court of appeals.

In any event, petitioners' challenge is premised on a misunderstanding of the relevant law. Petitioners appear to believe that the National Park Service can regulate activities on navigable waters within Voyageurs National Park only if the State has expressly conveyed its "sovereign" interests in those waters and the underlying submerged lands. See 99-989 Pet. 12-13, 16-17. As the court of appeals correctly recognized, however, the National Park Service's power to regulate commercial activities on navigable waters within Voyageurs National Park does not depend on whether the State has ceded it legislative jurisdiction over the waters in question or, for that matter, whether the State has conveyed its title to the submerged lands beneath those waters. See Pet. App. 12a-15a. The Property Clause of the Constitution empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. Congress, in turn, has lawfully authorized the National Park Service to "[p]romulgate and enforce regulations concerning boating and other activities on

or relating to waters located within areas of the National Park System." 16 U.S.C. 1a-2(h). The National Park Service accordingly has authority, derived from Congress's exercise of its Property Clause powers, to promulgate and enforce the regulations at issue here.

This Court addressed the scope of the Property Clause in *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976). In that case, the Court rejected New Mexico's contention that the Property Clause provides an insufficient basis for Congress to enact legislation to protect free roaming horses and burros found on federal lands. The Court stated at the outset:

> The question under the Property Clause is whether [Congress's] determination can be sustained as a "needful" regulation "respecting" the public lands. In answering this question, we must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress.

426 U.S. at 536 (citations omitted). The Court rejected as "without merit" the argument, which New Mexico pressed in *Kleppe* and petitioners assert in this case (99-989 Pet. 16-17), that Congress cannot regulate the matters in question unless it first obtains the State's consent through a grant of legislative jurisdiction. See *Kleppe*, 426 U.S. at 541-543.

Of particular relevance here, the Court rejected the notion that Congress cannot employ its Property Clause powers unless it first acquires "a property interest" in the subject of the regulation or the location where the regulated activity takes place. *Kleppe*, 426 U.S. at 537. To the contrary, Congress has "power to regulate conduct on *private* land that affects the public

lands." *Id.* at 538 (emphasis in original). See also *ibid.* ("the Property Clause is broad enough to reach beyond territorial limits"); *id.* at 546 ("it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control").

The Court noted in *Kleppe* that New Mexico's "narrow reading of the Property Clause" was inconsistent with the Court's prior decisions. 426 U.S. at 537. For example, in *Camfield* v. *United States*, 167 U.S. 518 (1897), the United States brought suit to compel the removal of a fence, constructed entirely on private property, that enclosed federal property. The government relied on an 1885 statute prohibiting enclosure of public lands. This Court upheld the statute and allowed removal of the fence, holding that the Property Clause conferred on Congress "the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection." 167 U.S. at 526. See *Kleppe*, 426 U.S. at 538.

The Court applied the same rationale in *United States* v. *Alford*, 274 U.S. 264 (1927). Alford was indicted for setting and leaving a fire on private property located near the public domain. The Court rejected the argument that Congress lacked the authority to regulate fires on private property, holding that "Congress may prohibit the doing of acts upon privately owned lands that may imperil the publicly owned forests." *Id.* at 267 (citing *Camfield*).

While petitioners cite this Court's decision in *Kansas* v. *Colorado*, 206 U.S. 46 (1907), as contrary authority, see 99-989 Pet. 20, the Court's decision in *Kleppe* expressly rejected that reading of *Kansas* v. *Colorado*. The Court explained that the language that petitioners

cite "does no more than articulate the obvious: The Property Clause is a grant of power only over federal property. It gives no indication of the kind of 'authority' the Clause gives Congress over its property." 426 U.S. at 537-538. Petitioners' reliance on *Colorado* v. *Toll*, 268 U.S. 228 (1925), see 99-989 Pet. 20, is likewise misplaced. In that case, the Court reversed the dismissal of a State's challenge to a federal park superintendent's claim of exclusive authority over a highway in Rocky Mountain National Park. See 99-989 Pet. 20. The Court's decision in *Kleppe* distinguished that case for reasons equally applicable here: "the Court found that Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause." 426 U.S. at 544.

The court of appeals properly applied this Court's Property Clause principles in this case. See Pet. App. 13a-15a. Congress has created the National Park System, including Voyageurs National Park, "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1; see 16 U.S.C. 160, 160f(a). Congress has authorized the Secretary of the Interior to promulgate regulations governing the use of lands and waters within the National Park System, 16 U.S.C. 1a-2(h). The National Park Service's regulation of commercial tour boats in Voyageurs National Park in accordance with Congress's legislative directives under the Property Clause is a lawful exercise of the federal government's power to protect and preserve federal property for the public good. See 16 U.S.C. 3; 36 C.F.R. 5.3.

As the court of appeals recognized, the Property Clause provides an independent basis, apart from state consent, for rejecting petitioners' challenge to the National Park Service's authority. The court of appeals' ruling is not only consistent with this Court's decisions, but it is also consistent with the decisions of other courts of appeals that have addressed analogous issues. Petitioner is unable to identify any court of appeals decisions in conflict with the decision below. To the contrary, the courts of appeals have repeatedly recognized that the Property Clause allows the United States to regulate activities that affect federal lands, even if those activities occur on navigable waters or adjacent state-owned lands. See *Free Enter. Canoe Renters Ass'n* v. *Watt*, 711 F.2d 852, 855-856 (8th Cir. 1983); *United States* v. *Arbo*, 691 F.2d 862, 865 (9th Cir. 1982); *Minnesota* v. *Block*, 660 F.2d 1240, 1249 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982); *United States* v. *Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979); *Brown I*, 552 F.2d at 822; see also *McGrail & Rowley* v. *Babbitt*, 986 F. Supp. 1386, 1394-1395 (S.D. Fla. 1997), appeal docketed, No. 99-10280-BB (11th Cir.).

2. Petitioner Armstrong additionally argues that the National Park Service lacks authority to regulate his activities by virtue of the Webster-Ashburton and Root-Bryce treaties. 99-1000 Pet. 10-16. The court of appeals properly rejected that argument. As the court explained:

> The treaties make clear that both the United States and Canada may adopt laws and regulations not inconsistent with the privileges of free navigation, so long as the laws are applied in a nondiscriminatory manner. Certainly requiring a tour boat operator in a national park to obtain a permit is not

> unreasonable and is not inconsistent with the privileges of free navigation. Moreover, it is clear that the regulations are applied in a nondiscriminatory manner. The regulation is equally applicable to American and Canadian citizens who seek to operate a business operation in [Voyageurs National Park].

Pet. App. 16a. Accord *Block*, 660 F.2d at 1257. This case and *Block* are the only court of appeals cases to address the question, and they are in agreement. There is no warrant for this Court to address Armstrong's novel argument, which presents a narrow question of treaty interpretation that has not generated any conflict among the courts of appeals.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2000

Supreme Court, U.S.
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No. 99-989

In The

# Supreme Court of the United States

CARL E. BROWN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF OF PETITIONER

### I. AS TO THE "CESSION OF JURISDICTION" ISSUE THE NPS HAS WAIVED ITS OPPOSITION AND THEREFORE CERTIORARI MUST BE GRANTED.

#### A. The "Opposition" Of The United States Is Frivolous And May Not Be Considered.

Petitioner Brown demonstrated in his petition that a true, direct, intolerable, and irreconcilable conflict exists between the decision of the Eighth Circuit and decisions of this Court and other Circuit Courts of Appeals regarding the manner in which a state may cede its sovereignty. Petition at 12. The National Park Service (NPS) does not dispute that such a conflict exists but instead argues that this Court should decline to grant certiorari because "[t]his Court denied Brown's previous petition for a writ of certiorari in *Brown I.*" Brief in Opposition at 6; see *United States v. Brown* (Brown I), 552 F.2d 817 (8th Cir. 1977), *cert. denied,* 431 U.S. 949 (1977).

This Court's denial of certiorari in *Brown I* has no precedential value whatsoever. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Teague v. Lane,* 489 U.S. 288, 296 (1989). "[T]his Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Singleton v. C.I.R.,* 439 U.S. 940, 944 (1978).

Therefore, the NPS's argument that this Court should not grant Brown's petition because this Court declined to grant certiorari in a previous case is frivolous, "because

its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255 (1938). A frivolous, or meritless, argument is ignored and is not considered by the courts. *United States v. Bustamante-Gamez*, 488 F.2d 4, 7 n. 2 (9th Cir. 1973) (Court will not "pause to consider" frivolous argument by government); *Northwestern Nat'l. Ins. Co. v. Maggio*, 976 F.2d 320, 321 (7th Cir. 1992).

### B. The NPS Has Waived Its Opposition To The Granting Of Certiorari.

Because the NPS's sole argument in opposition to Brown's petition for writ of certiorari on this issue is frivolous and not to be considered by this Court, the NPS has waived its objection to the granting of certiorari. Therefore, this Court should grant this petition.

### C. The Fact-Based Argument Of The NPS Is Frivolous And Constitutes A Waiver Of The NPS's Opposition To The Granting Of Certiorari.

The NPS argues that the question presented as to the "cession of jurisdiction" is a "fact-bound, case-specific question, the effects of which are limited to one national park." Brief in Opposition at 6. The NPS is in error.

#### 1. The facts of this case are not limited to one national park.

In *Colorado v. Toll*, 268 U.S. 228, 231 (1925), the NPS sought to regulate state and county highways passing through Rocky Mountain National Park. This Court ruled

that the NPS could not regulate those highways absent cession of jurisdiction from Colorado over those roads.

In *Adams v. United States*, 319 U.S. 312, 315 (1943), this Court held that the United States had no jurisdiction over land that Louisiana had not ceded and the United States had not accepted.

In *New York v. United States*, 505 U.S. 144, 182 (1992), this Court refused to find "cession" of sovereignty in the support of New York officials for federal legislation regarding disposal of radioactive waste in New York.

The facts of this case have occurred in the past, culminating in decisions by this Court as to the manner in which a state may cede its jurisdiction and sovereignty. That they will occur in the future is without question. There are pending in Congress numerous proposals for the creation of national parks and the designation of wilderness areas. Many of these proposals involve issues of state sovereignty. Thus the decision of the Eighth Circuit, that a state cedes its jurisdiction and sovereignty merely by its support of such federal legislation, has important national and constitutional implications. Therefore, this Court should grant this petition.

**2. The question of law presented here is of vital constitutional importance.**

**a. The question presented here is purely a question of law.**

This case does not turn upon the facts. Instead, whether cession of jurisdiction over state-owned waters

may be implied judicially from Minnesota's support for creation of the VNP is purely a question of law.

**b. The question presented here is one of vital constitutional importance.**

Since the Eighth Circuit's *Brown I* decision in 1977, this Court has resisted vigorously attempts by Congress to infringe upon state sovereignty. Most recently in *Kimel v. Florida Board of Regents*, ___ U.S. ___, slip op. at 2 (January 11, 2000) (Sup. Ct. No. 98-791), this Court reaffirmed its central holding in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), that Congress' Article I authority does not include the power to abrogate state sovereign immunity under the Eleventh Amendment. *Id.* at ___ (slip op. at 14).

In *Montana v. United States*, 450 U.S. 544, 552 (1981), this Court affirmed state control over property beneath navigable waters as a sovereign right of the states, holding that that right could not be conveyed by inference.

In *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991), this Court held that Congress may alter the "usual constitutional balance between the States and the Federal Government" only by "unmistakably clear language."

In *New York v. United States*, 505 U.S. at 182, this Court refused to find "cession" of New York's sovereignty in the support of New York officials for a federal statute.

Clearly, the decision of the Eighth Circuit is neither fact bound nor limited to one national park. By raising

such a frivolous argument, the NPS has waived its opposition to the granting of certiorari. Therefore, this Court should grant this petition.

## II. THE NPS HAS ENGAGED IN A CYNICAL AND SUPERFICIAL ANALYSIS OF *KLEPPE V. NEW MEXICO* THAT DISTORTS AND MISREPRESENTS THE HOLDING OF THIS COURT.

The NPS has distorted and misrepresented the holding of this Court in *Kleppe v. New Mexico*, 426 U.S. 529 (1976). Whether this distortion and misrepresentation are purposeful or merely the result of carelessness is irrelevant. The result is that the NPS's analysis of *Kleppe* must be rejected.

The NPS asserts erroneously that *Kleppe* "reject[ed]" Brown's argument "that Congress cannot regulate the matters in question unless it first obtains the State's consent through a grant of legislative jurisdiction." Brief in Opposition at 7. *Kleppe* had nothing to do with state cession. "[W]hile Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers [over its own land] under the Property Clause." *Kleppe*, 426 U.S. at 542-543. Thus *Kleppe* did not "reject[ ]" the requirement that a state must consent to the exercise of jurisdiction over "lands within a State." Instead, this Court recognized that Congress could not exercise jurisdiction over state lands without the state's consent.[1]

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[1] "Although the Property Clause *does not authorize* an exercise of a general control over public policy in a State, it does

The NPS asserts erroneously that *Kleppe* "rejected the notion that Congress cannot employ its Property Clause powers unless it first acquires a 'property interest' in the subject of the regulation or the location where the regulated activity takes place." Brief in Opposition at 7. *Kleppe* reached no such conclusion. Rather, this Court held simply that Congress could regulate wild animals living on federal property. *Id.* at 540-541.

The NPS asserts erroneously that *Kleppe* provides the NPS authority to regulate commercial activity on non-federal property. Brief in Opposition at 9. *Kleppe* reached no such holding because *Kleppe* had nothing to do with non-federal property. The only question answered in *Kleppe* was whether Congress could regulate wild horses and burros on federal land: "We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding." *Id.* at 546. Kleppe contains no other holding.[2] In fact, this Court specifically declined to consider whether the Property Clause empowers Congress to regulate non-federal lands.[3]

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permit an exercise of the complete power which Congress has over *particular public property entrusted to it.*" *Id.* at 540 (emphasis added).

[2] "We need not, and do not, decide whether the Property Clause would sustain the [Wild Free-Roaming Horses and Burros] Act in all of its conceivable applications." *Kleppe*, 426 U.S. at 546.

[3] "[W]e do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands . . . . We . . . leave open the question of the permissible reach of the [Wild Free-Roaming Horses and

Clearly *Kleppe* did not reach the holding that the NPS asserts that it reached. As a result, the holding of the Eighth Circuit creates a true, direct, intolerable, and irreconcilable conflict with the holding of this Court in *Kleppe*.

Moreover, contrary to the NPS's argument, *Kleppe* did nothing to undercut Brown's reliance on *Kansas v. Colorado*, 206 U.S. 46 (1907), or *Colorado v. Toll*, 268 U.S. 228 (1925). As to this Court's holding in *Kansas v. Colorado*, the *Kleppe* Court found it to be "no more than [an] articulat[ion of] the obvious: The Property Clause is a grant of power *only over federal property*." *Kleppe*, 426 U.S. at 538-539 (emphasis added). Regarding *Colorado v. Toll*, the *Kleppe* Court described that holding: "Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park . . . ."[4] *Kleppe*, 426 U.S. at 544.

Although the Eighth Circuit relied solely on its erroneous reading of *Kleppe* to support its holding that the Property Clause provides Congress with authority to regulate Minnesota waters,[5] the NPS relies on *Camfield v.*

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Burros] Act over private lands under the Property Clause." *Kleppe*, 426 U.S. at 546-547.

[4] This is the very proposition for which Brown cites *Colorado v. Toll*. Just as in *Colorado v. Toll*, because "Congress ha[s] not purported to assume jurisdiction" over Rainy Lake, *Kleppe*, 426 U.S. at 544, the NPS has no authority to regulate it. The Eighth Circuit's holding in *Brown* is in conflict with the holding of this Court in *Colorado v. Toll*.

[5] Although the Eighth Circuit also cited to *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1991), that decision was premised on the same erroneous reading of *Kleppe* as that found in the Eighth Circuit's *Brown* decisions. Similarly, the NPS relies on the Eighth Circuit's decision in *Free Enterprise Canoe Renters Ass'n of*

*United States*, 167 U.S. 518 (1897), and *United States v. Alford*, 274 U.S. 264 (1927). That reliance is misplaced.

In *Camfield*, this Court allowed removal of a fence, which was built on private property but denied access to federal lands, pursuant to the Property Clause, holding that Congress could protect public lands from such enclosure. *Camfield*, 167 U.S. at 526. Similarly, in *Alford*, this Court upheld Congress' power to prohibit the negligent setting of fires on private land that "imperil[ed]" federal lands. *Alford*, 274 U.S. at 267.[6]

Neither *Camfield* nor *Alford* provides authority for the NPS because Brown's activities on Rainy Lake neither enclosed nor imperiled federal lands.[7] In fact, the NPS

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*Missouri v. Watt*, 711 F.2d 852 (8th Cir. 1983), but that decision was also founded upon *Block* and *Brown I*.

[6] Similarly, *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979) and *United States v. Arbo*, 691 F.2d 862 (9th Cir. 1982), relied upon by the NPS, concerned the authority of federal officials to protect federal land from direct fire or health risk. No such risk was presented by Brown. In *McGrail and Rowley, Inc. v. Babbitt*, 986 F. Supp. 1386 (S.D. Fla. 1997), the plaintiffs were carrying passengers through state-owned waters to the federally-owned island of Boca Grande Key with intent to dock on federal land. Brown did not go onto federal lands nor did he intend to go onto federal lands. Petition at 8.

[7] Moreover, in *Kleppe*, presented with the opportunity to expand its holding in *Camfield*, this Court declined to do so. "While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control, Camfield v. United States, 167 U.S. 518, 17 S. Ct. 864, 42 L.Ed. 260 (1897), we do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands . . . ." *Kleppe*, 426 U.S. at 546.

regulation at issue has nothing to do with protecting public land from inaccessability or peril but with regulating "business operations" within the VNP. 36 C.F.R. § 5.3. Therefore, the Eighth Circuit did not rely on *Camfield* and *Alford*.

This Court should grant this petition to address the conflict between the holding of the Eighth Circuit and the holdings of this Court.

## III. THE USE BY THE UNITED STATES OF THE *BROWN* HOLDING IN OTHER CIRCUITS COMPELS THE GRANTING OF CERTIORARI.

This Court should grant certiorari for yet another reason. The United States has cited to the decisions of the Eighth Circuit in *Brown I* and the instant case in numerous federal courts arguing that federal agencies have authority under the Property Clause to regulate state and private lands. For example, before the U.S. Court of Appeals for the Seventh Circuit, the United States argued, "the federal government's authority over federally-owned lands includes the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands." *See* Brief for the Federal Appellees, *Shawnee Trail Conservancy v. United States Dept. of Agriculture*, 7th Circuit, Docket No. 99-3364, at 18 n. 6. The same argument was made before the U.S. Court of Appeals for the Sixth Circuit and was adopted by

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What is also clear from this passage is that the *Kleppe* Court did not view *Camfield* as providing the expansive authority over non-federal lands argued by the NPS.

seven members of an equally divided *en banc* court. *Stupak-Thrall v. United States*, 70 F.3d 881, 885 (6th Cir. 1995), *aff'd en banc*, 89 F.3d 1269 (6th Cir. 1996).

There is absolutely no question but that the holding of the Eighth Circuit is in conflict with the holdings of this Court; nonetheless, the United States is applying the holding of the Eighth Circuit throughout the land.[8] This Court should grant this petition to address this conflict.

## CONCLUSION

For all of the above reasons, this Court must grant this Petition.

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[8] The importance of this case is made clear by the amici brief filed by several states. *See*, Brief of *Amicus Curiae* for the States of Minnesota, Michigan, and Montana at 5-6, 15-18.